Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LAWRENCE AVIATION INDUSTRIES, INC.,

Petitioner,

v.

LAWRENCE SUMMERS, Secretary of Labor, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, and U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Congressional authorization underlying Executive Order 11246 permit the Secretary of Labor to decide that there shall be no time limitation whatsoever after the last act of alleged discrimination occurred within which administrative proceedings must be instituted?

II. Does Executive Order 11246 give the Secretary of Labor an unlimited amount of time after the last alleged act of employment discrimination in which to begin administrative proceedings against the employer?

PARTIES TO THE PROCEEDING

Petitioner is Lawrence Aviation Industries, Inc. (LAI), which has no parent companies. No publicly held company owns 10% or more of the stock of LAI. LAI was the petitioner in the District Court and appellant in the Second Circuit Court of Appeals. Respondents herein are the Secretary of Labor and the Office of Federal Contract Compliance Programs, who were respondents in the courts below.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Constitutional Provisions Involved	2
Statement of the Case	7
A. Procedural History	9
B. Statement of Facts	11
Reasons for Granting the Writ	14
I. The Limitations Period For Administrative Actions Under Executive Orders Is An Important But Unresolved Question.	14

Contents

Page

II. The Uncertainty Regarding Time Limitations On Actions To Enforce EO 11246 Should Be Resolved To Provide Guidance To Employers, The Government And The Judiciary. 17

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Woods, 2 Cranch 336 (1805) 14

Burnett v. Grattan, 468 U.S. 42 (1984) 15

Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 14

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) ... 9

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983) 9, 15, 16

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 9, 16

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) 9, 15, 16, 17

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 14

Telecommunications Research and Action Center v. Fed. Communications Comm'n, 750 F.2d 70 (D.C. Cir. 1983) 14

Utley v. Varian Assocs., Inc., 811 F.2d 1279 (9th Cir. 1987) 12, 16

Volvo GM Heavy Truck Corp. v. Department of Labor, 118 F.3d 205 (4th Cir. 1997) ... 7, 8, 16, 17, 18

Cited Authorities

Page

Statutes:

5 U.S.C. §§ 701-706 11

28 U.S.C. § 704 1

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 1

42 U.S.C. § 2000e 12

Regulations:

3 C.F.R. § 339 12

41 C.F.R. § 60-1.21 ..... 5, 17

41 C.F.R. § 60-1.26 ..... 5, 13

30 F.R. 12319 10

32 F.R. 14303 ..... 10, 12

54 F.R. 46501 10

Cited Authorities

Page

Other Authorities:

Executive Order 11246 ..... *passim*

Executive Order 11246 § 201 5

Executive Order 11246 § 207 2

Executive Order 11246 § 208 2

Executive Order 11246 § 209 ..... 3, 5

Executive Order 11246 § 209(a)(6) 7

Executive Order 11246 § 209(b) 16

Executive Order 11246 § 210 5

Executive Order 11375 12

TABLE OF APPENDICES

Page

Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed July 7, 1999 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated August 7, 1998 ..... 6a

Appendix C — Judgment Of The United States District Court For The Eastern District Of New York Dated And Filed August 12, 1998 ..... 38a

Appendix D — Final Decision And Order Of The United States Department Of Labor Dated November 9, 1995 ..... 40a

Appendix E — Decision And Remand Order Of The United States Department Of Labor Dated June 15, 1994 ..... 42a

Appendix F — Recommended Decision And Order Of The United States Department Of Labor Dated May 30, 1991 ..... 56a

OPINIONS BELOW

On May 31, 1991, Administrative Law Judge Silverman entered his Recommended Decision and Order, ruling that no limitations period applies to enforcement proceedings brought under EO 11246 and ordering LAI to pay back pay to 28 women who had applied for employment with LAI in 1981. App. 57a n.2; 81a. The Secretary of Labor entered a Decision and Remand Order on June 15, 1994, accepting Judge Silverman's limitations ruling but remanding for a redetermination of back pay. App. 55a. The Secretary's Final Decision and Order, entered November 9, 1995, adopted in its entirety the July 27, 1995 Recommended Decision and Order on Remand of a different Administrative Law Judge, and ordered Petitioner LAI to pay $74,577.67 in back pay plus $105,559.16 in prejudgment interest. App. 41a.

The opinion of the District Court, Eastern District of New York, Hon. Joanna Seybert, Judge presiding, granting summary judgment to the Secretary, affirming the Secretary's Final Decision and Order in all respects, and denying LAI's motion for summary judgment, was entered August 7, 1998. App. 37a, reported at 28 F. Supp. 2d 728. The Second Circuit affirmed in part in an unpublished Summary Order entered July 7, 1999, adopting the District Court's ruling on the limitations issue. App. 4a. All of the above-referenced opinions and the judgment are reproduced in the Appendix.

STATEMENT OF JURISDICTION

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 704, to review the final determination of the Secretary of Labor in this matter. The Circuit Court of appeals had jurisdiction under 28 U.S.C. § 1291 of LAI's

appeal from the final judgment entered pursuant to the District Court's order granting summary judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Executive Order 11246 (excerpt)

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 [sections 2000d to 2000d-4 of this title and this subchapter] or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary may:

> **(1)** Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.
>
> **(2)** Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.
>
> **(3)** Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964 [this subchapter].

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) After consulting with the contracting agency, direct the contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with equal employment opportunity provisions of the contract. Contracts may be canceled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the Secretary of Labor.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Pursuant to rules and regulations prescribed by the Secretary of Labor, the Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under subsection (a)(2) of this Section, or before a contract shall be canceled or terminated in whole or in part under subsection (a)(5) of this Section.

Sec. 210. Whenever the Secretary of Labor makes a determination under Section 209, the Secretary shall promptly notify the appropriate agency. The agency shall take the action directed by the Secretary and shall report the results of the action it has taken to the Secretary of Labor within such time as the Secretary shall specify. If the contracting agency fails to take the action directed within thirty days, the Secretary may take the action directly.

Regulations Adopted by the Department of Labor, under authority of EO 11246, § 201:

41 C.F.R. § 60-1.21 Filing complaints.

Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the Director for good cause shown.

41 C.F.R. § 60-1.26 Enforcement proceedings.

(a) General (a)(1) Violations of the Order, equal opportunity clause, the regulations in this chapter, or of applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings to enforce the Order and to seek appropriate relief. Violations may be found based upon, inter alia, any of the following: (i) The results of a complaint investigation; (ii) analysis of an affirmative action program; (iii) the results of an on-site review of the contractor's compliance with the Order and its implementing regulations; (iv) a contractor's refusal to submit an affirmative action program; (v) a contractor's refusal to allow an on-site compliance review to be conducted; (vi) a contractor's refusal to supply records or

other information as required by these regulations or applicable construction industry requirements; or (vii) any substantial or material violation or the threat of a substantial or material violation of the contractual provisions of the Order, or of the rules or regulations issued pursuant thereto.

(a)(2) If the investigation of a complaint, or a compliance review, results in a determination that the Order, equal opportunity clause or regulations issued pursuant thereto, have been violated, and the violations have not been corrected in accordance with the conciliation procedures in this chapter, The OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions, or any of the above. However, if the contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow the compliance agency access to its premises for an on-site review; and if conciliation efforts under this chapter are unsuccessful, The OFCCP, notwithstanding the requirements of this chapter, may go directly to administrative enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above. Whenever the Director has reason to believe that there is substantial or material violation or the threat of substantial or material violation of the contractual provisions of the Order or of the rules, regulations or orders issued pursuant thereto, he/she may refer the matter to the Solicitor of Labor to institute administrative enforcement proceedings as set forth in this section or refer the matter to the Department of Justice to enforce the contractual provisions of the Order, to seek injunctive relief (including relief against noncontractors, including labor unions, who seek to thwart implementation

of the Order and regulations) and to seek such additional relief, including back pay, as may be appropriate. There are no procedural prerequisites to a referral to the Department of Justice by the Director, and such referrals may be accomplished without proceeding through the conciliation procedures in this chapter, and a referral may be made at any stage in the procedures under this chapter: Provided, That no order for debarment from further contracts or subcontracts pursuant to section 209(a)(6) of the Order shall be made without affording the contractor an opportunity for a hearing, either administrative or judicial.

(b) [Reserved]

(c) Administrative enforcement proceedings Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in Part 60-30 of this chapter.

STATEMENT OF THE CASE

This case presents the unresolved question as to whether an agency of the federal government has the authority to decide for itself on a case-by-case basis what time limitation, if any, applies to the commencement of administrative proceedings to redress an alleged violation of an executive order. Even the Respondent Department of Labor's Office of Federal Contract Compliance Programs has acknowledged the uncertainty surrounding these issues. *See Volvo GM Heavy Truck Corp. v. Department of Labor*, 118 F.3d 205, 213-14 (4th Cir. 1997). Certiorari should be granted to resolve them.

The lack of any definitive time frame has led to lengthy delays in administrative proceedings to enforce EO 11246, which requires nondiscrimination in employment by government contractors. In this case, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) first notified Petitioner Lawrence Aviation Industries, Inc. (LAI) in 1983 that the OFCCP had found deficiencies in LAI's implementation in 1981 of the affirmative action program mandated by Executive Order 11246. The OFCCP's formal complaint against LAI was not filed until 1987, and the Secretary of Labor's ruling on the matter was not finalized until 1996. Long before these rulings occurred, LAI had cured the practices that led to the discrimination charges, leaving back pay for the 1981 job applicants as the sole issue. *See* App. 4a. Similar delays have occurred in other cases brought under EO 11246. *See, e.g.*, *Volvo GM Heavy Truck Corp. v. Department of Labor*, 118 F.3d 205 (4th Cir. 1997) (first notice of violation given in November 1989 regarding discrimination alleged in 1988 hiring practices; administrative complaint filed in December 1995).

LAI has always maintained that the OFCCP's actions were barred by a limitations period, while the OFCCP has contended in these proceedings that no limitations period at all applies to enforcement actions brought under EO 11246. The District Court and the Circuit Court agreed that there is no limitations period. *See* 28 F. Supp. 2d at 737, App. 26a-27a; Sum. Ord. 2, App. 2a-3a. In other cases, the Secretary has adopted the view that it may choose to impose a limitations period of some sort on some basis. *See Volvo*, 118 F.3d at 214, discussed in II, below.

The time within which administrative action to enforce an executive order must occur is an important, substantive

determination that has wide ranging importance both for governmental agencies and for the persons subject to their regulation. This Court has previously acknowledged that there is no clear grant of legislative authority upon which EO 11246 is based, and has suggested that the order may instead be based on "some more general notion" of executive authority. *Chrysler Corp. v. Brown*, 441 U.S. 281, 305-06 (1979). This Court has never ruled, however, on the limitations period issue presented by this case.

In a number of cases, this Court has dealt with the limitations period applicable to judicial proceedings where Congress does not expressly include a limitations period in legislation creating a private right of action. *See, e.g., DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983) (holding that Congress intended that the most closely analogous statute of limitations under state law should be applied). In some circumstances, an analogous federal limitations period has been borrowed, *see Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and in certain, unusual circumstances, this Court has ruled that Congress intended to create a right of action that has no limitations period at all, *see Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977). However, none of these cases addresses the limitations period, if any, that applies to administrative actions brought under the authority of EO 11246. The uncertainty surrounding this issue affects employers, courts and governmental officials alike. Certiorari should be granted to resolve these issues.

A. Procedural History

These proceedings began with an Administrative Complaint dated March 31, 1987, entitled *In the Matter of*

Office of Federal Contract Compliance Programs, U.S. Department of Labor, Plaintiff-Respondent against Lawrence Aviation Industries Inc., Defendant. The Complaint alleged violation of Executive Order No. 11246, as amended (30 F.R. 12319, 32 F.R. 14303, 54 F.R. 46501).

The Complaint alleged that in 1981, LAI discriminated against women on the basis of sex in traditionally failing and/or refusing to hire female applicants for entry level blue collar jobs. LAI answered on April 7, 1987, denying the allegation and asserting affirmative defenses. Supplemental pleadings, interrogatories and depositions followed. The case was heard by an Administrative Law Judge (ALJ) commencing on January 30, 1989, and continuing from time to time until April 1, 1989 (1908 pages of testimony were transcribed).

On May 30, 1991, the ALJ rendered his Recommended Decision and Order (R. D. & O.), awarding back pay to the 1981 job applicants. App. 81a. By his Decision and Remand Order dated June 15, 1994 (D. & R. O.), the Secretary of Labor remanded the Decision to the Administrative Law Judge to re-calculate back pay and to impose the sanction of debarment in the event the Petitioner-Defendant did not comply. App. 54a-55a.

On July 27, 1995, the Acting Chief Administrative Law Judge issued a Recommended Decision and Order on Remand (R. D. & O. R.), calculating the back pay amount to be awarded to the class of female applicants using a different method than was used in the initial R. D. & O. and adding an award of pre-judgment interest. The Secretary of Labor, by Final Decision and Order dated November 9, 1995 (F. D. & O.), adopted the R. D. & O. R. in its entirety. App. 41a.

On December 28, 1995, LAI filed its Petition in the District Court under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to review the Final Decision and Order. By its Memorandum and Order (Mem. & Ord.) dated August 7, 1998, the District Court granted the Secretary's motion for summary judgment affirming the Final Decision and Order, and the District Court's judgment was entered August 12, 1998. App. 38a.

On appeal, the Second Circuit reversed in part, finding that the agency had failed to consider relevant evidence in calculating the back pay award, but rejecting LAI's contention that the agency's action should have been dismissed in its entirety as untimely. *See* Sum. Ord. App. 4a-5a.

B. Statement of Facts

LAI, formed in 1959, is one of three producers in the United States of titanium alloy sheet. It was the sole source supplier for stringers for the F-14 aircraft produced by Grumman, and it is the world-wide sole source of eight-percent manganese titanium sheet. It has acted and continues to act as a government contractor, and as such is subject to the requirements of EO 11246. App. 60a.

In 1979, a fire destroyed a large part of the plant, requiring LAI to lay off half of its employees. As it rebuilt its workforce in 1981, LAI hired 175 general factory helpers, all male, from a total applicant pool of 877. Twenty-eight of the applicants were women. App. 60a-62a. LAI completed the process of reconstituting its workforce late in 1981, when the last new employee was hired. App. 62a.

Executive Order 11246 was adopted in 1965 as an important component of the federal affirmative action programs then viewed as essential to ensure that employees were hired without regard to race. *See Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1284 (9th Cir. 1987). It requires every government contracting agency to require nondiscrimination in employment by all government contractors, and has prohibited discrimination based on sex since 1967.[1] The Secretary of Labor has adopted comprehensive regulations to implement EO 11246, as amended, and has responsibility for securing compliance with its provisions, and designated the OFCCP to oversee efforts to secure compliance with EO 11246 and its regulations. *See* Note, 42 U.S.C. § 2000e.

Each year, LAI filed an affirmative action program (AAP) with the Department of Labor and its predecessor. *See* App. 8a. On January 12, 1983, LAI was advised by letter from the employment standards administration of the OFCCP that it was deficient in its AAP for 1981 in failing to hire six female general factory helpers, six being the goal that was set in the AAP for that year. LAI denied this allegation, but the OFCCP and LAI were unable to resolve LAI's alleged sex discrimination in employment through conciliation efforts. App. 58a-59a.

Nearly six years after the last act of alleged discrimination, the OFCCP filed an administrative complaint

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1. Executive Order 11246 directs the Secretary of Labor to take actions to prevent federal government contractors from engaging in employment discrimination on the basis of "race, creed, color, or national origin." 3 C.F.R. § 339 (1964-1965 Compilation). Executive Order 11375 added six proscribed bases of discrimination, including sex, to the list contained in Executive Order 11246. 32 F.R. 14303 (1967).

against LAI with the Office of Administrative Law Judges of the Department of Labor. The Complaint, filed on March 31, 1987, alleged that LAI had violated the Executive Order by engaging in a pattern or practice of sex-based employment discrimination in 1981 and by failing to remedy the discrimination through payment of back pay to the victims of that discrimination. App. 58a-59a.

Following pretrial discovery, a trial was held before Administrative Law Judge Aaron Silverman of the Department of Labor. The trial lasted for twelve days. LAI argued that the administrative action was barred by the applicable limitations period, in this case the 180-day period of 41 C.F.R. § 60-1.26. Post Trial Memorandum of LAI, October 13, 1989 at 15. Judge Silverman rendered his Recommended Decision and Order on May 31, 1991, rejecting LAI's limitations argument and ruling that the issue of limitations "does not apply to agency complaints following compliance reviews." App. 57a n.2. The R. D. & O. found that LAI had engaged in a pattern or practice of sex discrimination in employment, and required LAI to pay back pay to each of the twenty-eight women who had applied for jobs in 1981. App. 81a-82a.

The Secretary of Labor's Decision and Remand Order of June 15, 1994 adopted the ALJ's recommended findings, but ordered the matter remanded for calculation of back-pay using a different method. Following remand, another Administrative Law Judge issued a Recommended Decision and Order on Remand on July 27, 1995, using a different formula to award back pay. The Secretary of Labor issued a Final Decision and Order on November 9, 1995, adopting the recommendations of the R. D. & O. R. in their entirety. App. 38a-39a.

LAI petitioned the District Court for review, renewing its argument that the administrative action was untimely. The District Court ruled, however, that no limitations period applies to actions by the OFCCP to enforce EO 11246. App. 26a-27a. The Second Circuit reversed in part,[2] but adopted the District Court's rationale in affirming the limitations period ruling. App. 2a-3a.

REASONS FOR GRANTING THE WRIT

I. THE LIMITATIONS PERIOD FOR ADMINISTRATIVE ACTIONS UNDER EXECUTIVE ORDERS IS AN IMPORTANT BUT UNRESOLVED QUESTION.

It is an essential function of statutes of limitations to assure fairness to defendants, and to prevent " 'surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' " *See Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965) (citing *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Indeed, as Mr. Chief Justice Marshall observed, a case with no limitations period at all "would be utterly repugnant to the genius of our laws." *Adams v. Woods*, 2 Cranch 336, 342 (1805). It has also been observed that the time agencies take to make decisions must be governed by a 'rule of reason.' *See Telecommunications Research and Action Center v. Fed. Communications Comm'n*, 750 F.2d 70, 81 (D.C. Cir. 1983). The question of

2. The Circuit Court ruled that the back pay calculation was flawed because the agency did not consider LAI's evidence on this issue, and remanded with directions that the District Court further remand the case to the agency. See App. 3a.

which limitations period applies in the face of legislative silence has been litigated in a number of cases over the years, although none of them have addressed the issue presented here.

This Court has often noted that when a federal statute is silent as to the limitations period, it is not appropriate to assume that no limitation at all was intended. Instead, it has generally been held that Congress intended that the most closely analogous statute of limitations under state law should be applied. *See Del Costello*, 462 U.S. at 159-60 (citing cases). Where state limitations periods would be "unsatisfactory vehicles for the enforcement of federal law," however, this Court has found that the proper approach is to borrow the most closely analogous federal statute of limitations. *Id.* at 162; *see also Burnett v. Grattan*, 468 U.S. 42, 48-49 (1984) (three-step process mandated under Civil Rights Acts before borrowing state limitations period).

Recognizing the values that limitations periods vindicate, this Court has required clear indicia of legislative intent, and assurances that affected parties will not unfairly be denied notice of the dispute, before ruling that no limitations period at all applies to actions brought under federal statutes. In *Occidental Life*, this Court found that Congress intended Title VII to be enforced through administrative action using negotiation and conciliation to resolve disputes, and in order to accomplish this purpose, Congress intended actions brought under Title VII to have no limitations period. 432 U.S. at 368. This Court also noted that the legislation required prompt notice to alleged discriminators, so that evidence, records and testimony could be preserved if the dispute did eventually require judicial resolution. *Id.* at 372.

These concerns form the backdrop for the time limits that apply to the administrative actions taken under EO 11246 in this case, and show that this case raises issues left untouched by *Occidental Life*, *DelCostello*, *Lampf* and other cases. First, this case involves an executive order that has uncertain legislative origins, so the inquiry must begin by asking whether Congress intended to bestow blanket authority to conduct open-ended investigations with no time limits at all. Additionally, the "executive rather than congressional intent," *see Utley*, 811 F.2d at 1285, must be examined to ascertain whether EO 11246 itself contemplated such a scheme. And unlike Title VII, which imposes strict time limits for the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator, *see Occidental Life*, 432 U.S. at 372, EO 11246 as construed below has no such time limits.

There are clues in the language of EO 11246 which show that the "no time limitation" view adopted by the District and Circuit Courts in this case is wrong. For example, EO 11246 provides that the Secretary of Labor shall "make reasonable efforts, *within a reasonable time limitation*, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before [enforcement] proceedings shall be instituted. . . ." EO 11246 § 209(b) (emphasis added). The ruling below, holding that the Secretary is under no time constraints, is inconsistent both with this language and with the fundamental concepts of fairness emphasized in *Occidental Life* and other cases.

It has been suggested in some EO 11246 cases that an analogous state limitations should be borrowed, *see Volvo*, 118 F.3d at 207-08, and LAI has argued in these proceedings

that the 180-day limitations period of 41 C.F.R. § 60-1.21 should be borrowed, because it is the most closely analogous limitations period that applies to these issues. As the discussion in the next section shows, even the Secretary has acknowledged the uncertainty surrounding these issues.

II. THE UNCERTAINTY REGARDING TIME LIMITATIONS ON ACTIONS TO ENFORCE EO 11246 SHOULD BE RESOLVED TO PROVIDE GUIDANCE TO EMPLOYERS, THE GOVERNMENT AND THE JUDICIARY.

In this case, LAI has been obliged for more than a decade to contest allegations of discrimination that were old when made, and to contest the OFCCP's methodology in computing back pay without access to evidence that could have been gathered if LAI had known about the OFCCP's charges in time. There were no ongoing disputes regarding LAI's practices, which had long been free from discriminatory acts by the time the administrative complaint was filed in 1987. The Secretary argued in this case that such delays are permissible, because EO 11246 imposes no time limits upon its investigations.[3] Under this rationale, investigations that began five, ten or fifty years after the last act of discrimination would be timely.

The agency has not consistently taken this position, however. In *Volvo*, for example, the OFCCP asserted that

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3. It has not been suggested that proceedings under EO 11246 such as these to recover back pay would have no limitations period because they are brought by the United States in its sovereign capacity. It is clear that such an argument would be unsuccessful, in any event. *See Occidental Life*, 432 U.S. at 381-83 (Rehnquist, J., dissenting).

its position on this issue was not firm, acknowledged that there was no clear cut answer to the limitations question, and seemingly suggested that the agency could decide for itself what limitations period should apply. *Volvo*, 118 F.3d at 213-14.

This uncertainty leaves courts, employers and government agencies in doubt as to what limitations period, if any, applies to administrative enforcement actions. Certiorari should be granted to resolve these doubts.

CONCLUSION

For the reasons stated above, this petition is well taken and should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JULY 7, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7 day of July one thousand nine hundred and ninety-nine.

PRESENT:

Joseph M. McLaughlin,
José A. Cabranes,
Circuit Judges,
Robert L. Carter,*
District Judge.

No. 98-6219

LAWRENCE AVIATION INDUSTRIES, INC.,

Petitioner-Appellant,

– v. –

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

ROBERT REICH, Secretary of Labor, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents-Appellees.

* * *

Appeal from the United States District Court for the Eastern District of New York (Joanna Seybert, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED in part, VACATED in part, and REMANDED to the district court with instructions that it remand the cause to the Secretary of Labor as noted below.

Lawrence Aviation Industries, Inc. ("Lawrence") appeals from a judgment of the district court, denying its petition for review of a November 9, 1995 final decision of the Secretary of Labor. That final decision incorporated earlier administrative rulings that had (1) found Lawrence to have discriminated against women in its hiring practices for "entry level blue-collar jobs" during 1981, (2) calculated the hypothetical amount of money that would have likely been earned by the successful female applicants, absent discrimination, and (3) ordered this sum, plus accrued interest, to be divided among the 28 female applicants.

For substantially the reasons stated by the district court in its detailed opinion, *see Lawrence Aviation Indus. v. Reich*, 28 F. Supp. 2d 728 (E.D.N.Y. 1998), we affirm so much of

the judgment as rejected Lawrence's claims (1) that the administrative action was untimely when filed, and (2) that the Secretary erred in awarding interest.

However, we agree with appellant that the agency's calculation of the back-pay award was flawed. The agency began with the presumption that women and men would have been hired at the same rate, in the absence of discrimination. Lawrence hired 175 out of 849 male applicants during the relevant time period, compared to zero of 28 female applicants. Since women thus made up approximately 3% of the applicant pool (28 / (849+28) = 0.032), a non-discriminatory hiring process would have resulted in 6 of the 28 being hired (0.032 x 175 = 5.6). None of this is seriously contested on appeal.

What is contested, however, is the length of time that the successful female employees would have remained in Lawrence's employ. Lawrence argues on appeal — as it did before the agency — that the proper measure is the median length of time that successful male applicants remained on the job, whether they left voluntarily (for instance, to take another job, or to pursue education) or involuntarily as a result of layoffs. (Lawrence's proposed methodology would result in an average of 12.5 weeks.) At a fairly early stage of the administrative proceedings, the Secretary rejected this argument, ruling that it was appropriate to apply a presumption favoring the victims of discrimination, and thus to presume — in the absence of evidence to the contrary — that all of the successful female applicants would have remained until they were *involuntarily* discharged. Accordingly, the agency calculated the back-pay award on

the basis of the average length of time served only by those male employees who were ultimately laid off (61.29 weeks, as compared to the 12.5 weeks urged by Lawrence). Nevertheless, Lawrence introduced evidence for the purpose of showing that certain of the female applicants would not have been available to work at Lawrence for the full 61.29 weeks. While we express no view as to the persuasiveness of this evidence, there is no indication in the record that the agency ever gave it consideration.

At this stage, we do not attempt to resolve finally the method that the agency should employ to calculate the back-pay award. Assuming, however, that the agency was correct in applying its presumption that all female employees would have worked until laid off, the agency nevertheless has not passed upon evidence arguably sufficient to overcome this presumption as to certain of the female applicants. On remand, the agency should have the opportunity to consider this evidence in the first instance.

The agency may also wish to consider on remand the question of whether the back-pay award should be offset by the sums actually earned by the class. We do not reach this argument, because Lawrence did not preserve it for our review by raising it before the district court. However, Lawrence did raise this argument before the agency, and we leave it to the agency to determine whether this argument ought to be revived on remand.

Accordingly, we AFFIRM the portions of the judgment indicated above, we VACATE the judgment to the extent that it let stand the agency's back-pay calculation, and we

REMAND to the district court for further appropriate proceedings, including further remand to the agency for proceedings consistent with this order.

For the Court,
Karen Greve Milton, Acting Clerk

By: s/ Ralph A. Anderson
RALPH A. ANDERSON,
DEPUTY CLERK
ACTING OPERATIONS MANAGER

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AUGUST 7, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

95-CV-5377 (JS)

LAWRENCE AVIATION INDUSTRIES, INC.,

Petitioner,

– against –

RICHARD REICH, SECRETARY OF LABOR,

Respondent.

MEMORANDUM AND ORDER

* * *

SEYBERT, District Judge:

Petitioner Lawrence Aviation Industries ("LAI") is a manufacturer of sheets of titanium alloy used in building jet aircraft and is a former government subcontractor with the United States Department of Labor (the "DOL"). After a compliance review from the DOL's Office of Federal Contract Compliance Programs ("OFCCP"), the OFCCP initiated an administrative action on March 31, 1987 against LAI based on LAI's alleged failure to comply with Executive

Appendix B

Order 11246, prohibiting all government contractors from engaging in a pattern or practice of discrimination in employment. In particular, the OFCCP challenged LAI's hiring practices in 1981 on a finding that LAI had not hired a single woman from the 28 applicants that year, while it had hired approximately 20% of the male applicants. After a full hearing before an Administrative Law Judge ("ALJ") and a further determination after a remand from the Secretary of Labor, the Secretary issued a final order dated November 9, 1995, which found that LAI had engaged in a pattern of intentional gender discrimination and awarded backpay in the aggregate amount of $74,577.67, prejudgment interest in the amount of $105,559.16, and ordered LAI to make payment of this award within 60 days or be debarred from future government contracts.

LAI now seeks administrative review pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 of the Final Order dated November 9, 1995 of respondents Robert Reich, the Secretary of Labor and the Department of Labor. For the foregoing reasons, the decision of the Secretary is affirmed.

FACTUAL BACKGROUND

The following facts are set forth as provided in the government's statement pursuant to Local Rule 56.1 (formerly Rule 3(g)) and are not disputed except as indicated.

I. *PROCEDURAL BACKGROUND*

As a government subcontractor, LAI was subject to the requirements of Executive Order 11246 (the "E.O.") and the

regulations promulgated thereunder. *See* Note, 42 U.S.C. § 2000e. The E.O. requires government contractors to agree to abide by non-discrimination rules and to subscribe to several government contract provisions, including the following:

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin . . . . The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

The Secretary of Labor is responsible for securing compliance with this E.O. by all government contractors and subcontractors. In this regard, the Secretary has designated the OFCCP to oversee the Department of Labor's efforts to secure compliance with the E.O. and its regulations.

The OFCCP conducted a compliance review of LAI's employment practices in 1983 and determined that in 1981, LAI had engaged in a pattern or practice of discrimination on the basis of sex.[1] OFCCP and LAI were then unable to

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1. Petitioner denies that OFCCP challenged a pattern or practice and asserts in the alternative that OFCCP sought an illegal affirmative action program. *See* Discussion, *infra*.

resolve LAI's alleged sex discrimination in employment through conciliation efforts. Consequently, OFCCP filed an administrative complaint against LAI with the Office of Administrative Law Judges of the Department of Labor on March 31, 1987. The complaint alleged that LAI had violated the E.O. by engaging in a pattern or practice of sex-based employment discrimination in 1981 and by failing to remedy the discrimination through payment of backpay to the victims of that discrimination.

Following pretrial discovery, a trial was held before ALJ Aaron Silverman of the Department of Labor. LAI was represented by counsel at the trial, which lasted for twelve trial days. LAI had the opportunity to cross-examine OFCCP's witnesses,[2] to call witnesses in its behalf, and to introduce documentary evidence and expert testimony in defense of OFCCP's claim of discrimination.

Judge Silverman rendered a Recommended Decision and Order ("R. D. & O.") on May 31, 1991. The ALJ recommended that the Secretary of Labor find that LAI had engaged in a pattern or practice of sex discrimination in employment by treating the 28 women who applied for entry level jobs unequally with men and failing to hire them in 1981. As a remedy, the ALJ recommended that the Secretary of Labor order LAI to pay back pay to each of the 28 women in the amount of $2,000, although he did not recommend that the Secretary of Labor require LAI to pay prejudgment

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2. Petitioner claims that his counsel was not able to cross-examine the government's investigator regarding the thirteen women applicants who were not called to testify. Tr. 476, 518. *See infra* Discussion regarding procedural due process.

interest on the back pay. The ALJ's determination of the backpay award was based on the median length of employment of all men hired in 1981, which was 12.5 weeks, at a rate of $4.00 per hour for a 40 hour week. Finally, the ALJ recommended that the Secretary of Labor deny OFCCP's request for an order requiring LAI to pay the back pay within 60 days or be debarred from further Government contracts and subcontracts.

Following submission by LAI and OFCCP of exceptions to the ALJ's R.D.& O., the Secretary of Labor rendered a Decision and Remand Order on June 15, 1994. ("D. & R. O."). In the D. & R.O., the Secretary adopted the ALJ's recommended finding that LAI had engaged in a pattern or practice of sex discrimination in employment. The Secretary, however, rejected the ALJ's recommended backpay calculation. The Secretary concluded that under a nondiscriminatory selection procedure, LAI would have hired 6 of the 28 female applicants in 1981 (roughly 20% of the women who applied). He also found that the period of back pay should be determined pursuant to a formula that (1) establishes the period of back pay as beginning with the median date of hire of the 175 male hirees and continuing to the median date of termination of the 41 men who were involuntarily discharged through company layoffs (thus not including those men who resigned or were fired), (2) calculates the average hourly wage of the 41 men, and (3) multiplies that hourly wage by the number of hours that six women would have worked between the two dates. In this regard, the Secretary found that the backpay should include shift differentials, periodic wage increases and fringe benefits that the ALJ had excluded from the back pay calculations.

Appendix B

In addition, the Secretary decided that the gross backpay amount should be divided equally among all 28 women and that LAI should pay interest on the back pay. Finally, the Secretary found that LAI should be required to pay the back pay within 60 days or be barred from further Government contracts or subcontracts.

After reaching this determination, the Secretary remanded the proceeding to the Office of Administrative Law Judges for further recommended findings in accordance with the remand order. Following additional submissions by LAI and OFCCP, Acting Chief Administrative Law Judge John M. Vittone issued a Recommended Decision and Order on Remand on July 27, 1995. ("R. D. & O. R."). Applying the back pay formula that the Secretary of Labor found was applicable, Judge Vittone determined that the median length of employment for the 41 men who the company laid off was 61.29 weeks, or 2,451.60 hours, multiplied that by the compensation rate (for wages and benefits) of $5.07 per hour, and multiplied that figure by 6, the number of women who would have been hired based upon their representation in the applicant pool, for a gross back pay amount of $74,577.67. The ALJ determined that the interest due on the gross amount was $105,559.16, for a total amount due the women of $180,136.88. Dividing that sum by 28, the ALJ determined that LAI must pay each woman $6,433.46 by providing 28 checks in that amount payable to the employees of the U.S. Department of Labor. Judge Vittone further recommended that LAI be required to pay the back pay with interest within 60 days or be debarred from future government contracts and subcontracts.

Appendix B

Following submission by LAI and OFCCP of exceptions to the Recommended Decision and Order on Remand, the Secretary of Labor issued a Final Decision and Order ("F. D. & O.") on November 9, 1995, adopting Judge Vittone's recommendations in their entirety.

II. *EVIDENCE BEFORE THE SECRETARY*[3]

In 1979, a fire destroyed a large part of LAI's factory, causing the company to lay off half of its employees. Following rebuilding of the plant, LAI began hiring again. (Tr. 375).[4] Among the openings LAI filled were entry level blue-collar positions in machine operation and other factory work. Those positions required no previous training and the workers who filled them received limited on-the-job training. (Tr. 303-04, 308, 780; PX4; DX17; DX87, at 7). The newly

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3. The Court has carefully reviewed the transcript of the hearing and finds the Government's statements as described in its Rule 56.1 statement to be an accurate reflection of the record. To the extent the petitioner disputes these facts, it is so noted.

4. For sake of ease, the Court will utilize the same method of denoting transcript references as stated in the government's Rule 56.1 statement. Thus, "Tr. " refers to the transcript of the hearings before Administrative Law Judge Silverman. Due to a transcription error, the transcript of the hearing of January 30, 1989 begins with page "1" as does the transcript of the hearing of January 31, 1989. The transcripts of the hearing dates following January 31, 1989 are paginated in sequence through page 1907. Accordingly, references to the transcript for January 30, 1989 are be denoted by "Jan. 30 Tr. ." "PX " refers to Plaintiff's Exhibits introduced by OFCCP during the hearings before ALJ Silverman. "DX " refers to the exhibits introduced by LAI.

hired workers normally started as "General Factory Helpers" or "Maintenance Helpers." (Tr. 837-38, 1139).

Workers hired into those positions held them on a probationary basis for the first thirty days of employment. (*Id.*; PX3B). During the thirty day probationary period, the new hires were assigned to various jobs on an "as needed" basis. (Tr. 838; PX3B). At the end of the probationary period, they were assigned to one of the company's positions identified in the company's collective bargaining agreement with the International Association of Machinists. (Tr. 838; PX3B; DX11). All of the men hired in 1981 were classified as "Maintenance Man General Utility" or "Heat Treater & Metal Cleaner." (PX5; PX6). Those positions fell into an "operative" job category (PX11), a category of "workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training." (DX108, p.6).

During 1981, twenty-eight women applied for the entry level blue-collar jobs, but LAI did not hire any of them. Tr. 303, 334. At the same time, LAI hired 175 of 849, or approximately 20%, of the male applicants for entry level blue-collar jobs. Tr. 303, 309, 317-18, 334; PX6. Late in 1981, LAI began to lay off the men that it had hired in 1981. By the end of 1983, all but two of the 175 men had been laid off. (PX5B; PX6; DX9; DX16).

John Rowane was Assistant to the General Manager/ Vice-President of LAI, Gerald Cohen, during 1981. In that position, Mr. Rowane interviewed job applicants, maintained

personnel records and oversaw the company's "Affirmative Action Programs." (Tr. 751-54). Mr. Rowane interviewed nearly all the applicants for operative positions in 1981 (Tr. 808-10), and was ultimately responsible for hiring them under the direction of Gerald Cohen. (Tr. 1731).

Fifteen of the 28 female women who applied for entry level blue collar positions in 1981 testified at the hearing. (Jan. 30 Tr. 19-21, 59, 89-94, 134; Tr. 8-11, 40-44, 74-86, 90-94, 117, 136-39, 153-54, 160-62, 169-72, 211-13, 252, 274). The employment applications of all 28 women were received in evidence. (PX 10). Each of the women applied for an unskilled position and was denied a job and each of the jobs for which the women applied remained open until they were filled by male applicants. (PX7, PX16, DX113)

Jacqueline Cox, one of the 28 female applicants, testified about her experience when she applied for a factory job as follows: She testified that on May 22, 1981, she completed an application, gave it to a receptionist, and waited for her name to be called for an interview. (Tr. 76). While she waited, "quite a few" male applicants arrived, completed applications, were interviewed, and left with job offers. (Tr. 77-79). She twice asked the receptionist when she would be interviewed, and each time the receptionist told her to wait. (Tr. 77). After waiting an hour and a half, Mr. Rowane conducted an interview. Mr. Rowane told her that the job was not "fit for a woman" because it involved heavy lifting, dirty conditions and night-work.[5] (Tr. 84). Ms. Cox stated that she had done heavy work before, and was willing to do it again, and that she did not mind that the job entailed

5. Petitioner denies that Rowane made this statement.

working at night or dirty work. She asked for a chance to show that she could do the job. (*Id.*) Mr. Rowane then encouraged her to seek secretarial work. Ms. Cox told him that she had done secretarial work, did not enjoy it, and was interested in the factory job. Mr. Rowane persisted, asking her how quickly she could type. (Tr. 85-86). At the end of the interview, Mr. Rowane told Ms. Cox he would call her if there were any job openings. She never heard from him again.[6] (Tr. 86-7).

Margaret O'Keefe Havemann then testified about her experience when she applied for a factory job as follows: On January 7, 1981, responding to a newspaper ad, she went to LAI's Administrative Office, asked for an application, and was told to wait. Mr. Rowane appeared and told her: "You can fill out an application but you are not going to get this job because you are a woman. But you are free to fill out an application anyway if you choose to do so." (Tr. 40). Ms. O'Keefe Havemann, who by the time of the administrative hearing had become a New York City Police Officer, was shocked by the statement. (Tr. 71). She replied that she was a strong, able-bodied person and wanted to fill out the application. (Tr. 42). She completed the application (PX 10), and Mr. Rowane conducted a five minute interview during which he "didn't describe the job in any way" and did not say anything about pay or benefits. (Tr. 45).[7]

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6. Petitioner contends that the reason Ms. Cox was not hired was that she stated she was only interested in working until school began. Tr. 107.

7. Petitioner argues that Ms. Havemann's testimony should not have been credited because she was sisters with Erin Walters, another

(Cont'd)

Appendix B

Erin Walters testified about her experience when she applied for a factory job as follows: Responding to LAI's classified ad in *Newsday* for "Sheetmetal workers, no experience necessary," she applied for a position at LAI on January 7, 1981. (Tr. 6). After completing an application, Mr. Rowane conducted a 10 minute interview. (Tr. 10). Mr. Rowane asked her, "Why are you applying for this job? This is man's work." (Tr. 8). Mr. Rowane noted that Ms. Walters had attended college, and asked her, "[W]hy don't you apply for office work?" Ms. Walters testified that she told him that she would do office work, but that she was responding to the ad for sheetmetal workers and had done so "because I had needed a job and I was primarily interested in the benefits that LAI had to offer." (Tr. 8-9). Mr. Rowane did not describe any details of the sheetmetal job other than that "it was man's work, it was heavy work." After the interview, she never received a call from LAI. (Tr. 11).

Dolores Gumbinsky also testified about her experience when she applied for a factory job at LAI. At the suggestion of an LAI employee, she applied for a job at LAI on April 21, 1981. (Tr. 153). After she completed the application, Mr. Rowane interviewed her for five to seven minutes. The interview was "very fast." She testified that:

(Cont'd)
applicant, and their testimony varied and was tainted because they were only seeking compensation offered to them from OFCCP. Tr. 8, 32, 55. In addition, Ms. Havemann testified that she attended school full time at Suffolk County Community College from September 1980 through June 1984 and so stated in her application to the police department. Tr. 59, 61.

> [W]hen I went in [Mr. Rowane] told me that — he looked at me, that — right away he said that it had to do with sheet metal and I — he felt that I couldn't do the work. And so, you know, I felt that if the man feels I can't do the work, he's right.
>
> So then right away he changed the conversation and he said to me, "I see that you have some secretarial or clerical skills" — I mean, "clerical skills. How are you?" You know, right away, he changed the conversation.
>
> And I said, "Well, I am rather rusty." And that was — you know, that was the end of the interview, really.

(Tr. 154).[8] Ms. Gumbinsky never heard from LAI after the interview.

The Secretary of Labor credited the testimony of Ms. Cox, Ms. Havemann, Ms. Walters and Ms. Gumbinsky. (D. & R. O., at 3-4 (citing R. D. and O. at 7)).

In response to OFCCP's request for the company's description of blue collar jobs into which LAI hired the applicants in 1981 (PX3A), LAI submitted a set of descriptions for the nine operative titles. (PX4). All nine

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8. Petitioner argues that these statements should be disregarded because they reflect a state of mind of the interviewer. Tr. 154. Petitioner also suggests that the decision not to hire Ms. Gumbinsky was based on her diminutive size (4'11" tall and 100 lbs.).

descriptions state that one of the qualifications was that the applicant be a man.[9] In addition, approximately 85% of the men hired in 1981 were placed in the "Heat Treater & Metal Cleaner" operative category. (Tr. 315; PX6). The description for that category read, in pertinent part, as follows:

Job Requirements
Man, Spec. Age Required *18*
Hrs. of Wk. (if not reg.)
Reg. Exper. Prev. Jobs Time — None
Apprenticeship — No

(PX, p.6).

The record also reflects that the company's president, Lawrence Cohen, personally interviewed 72, or 40%, of the 175 men who were hired in 1981, but did not interview even one of the female applicants. (Tr. 891; PX9).

Statistical evidence was also presented at the hearing before the ALJ. Specifically, in 1981, the company hired 20% of the male applicants and 0% of the female applicants. LAI's expert, Dr. Barry Simon, performed two tests for statistical significance of the disparity between male and female hiring rates, the chi-squared test and Fisher's Exact test. Both tests revealed that the disparity was statistically significant. (DX115 at p.1). Dr. Simon testified that the

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9. Petitioner makes the argument that the word "man" is supposed to be gender neutral as indicated in its collective bargaining agreement, which states that the words "he, his, man" should be understood to mean both sexes.

disparity is "most definitely not due to chance alone . . . [Z]ero out of 28 ain't just change." (Tr. 1274). The disparity between the predicted and actual number of women hired in 1981 was 2.9 standard deviations. (D. & R. O. at 3 n.2). In addition, between 1975 and 1981 LAI hired 1,020, or 20.1% of 5,077 male applicants, while hiring only 2, or 0.9%, of 225 female applicants. (PX11; Tr. 345-53).

The ALJ also heard testimony that during 1981, the company did not have any written standards for evaluating employment applicants. (Tr. 1113-14). Indeed, LAI first set forth "Selection Criteria for Blue Collar Hires" in writing in 1982, during the course of OFCCP's investigation. (PX3B at 2). The criteria were written by Mr. Rowane and stated in relevant part:

> The application is the initial basis for selection. There are two main points that are sought. First, some type of factory or warehouse experience, so that the individual is aware of shop conditions, as opposed to office or sales work. Secondly, a background which shows continued and steady work history, and/or education or training, as opposed to frequent changes of short duration.
>
> Final Selection is made during a personal interview, where an attempt is made to evaluate the individual's attitude, ability to do heavy work, interest in becoming a permanent, steady employee, etc.

Nevertheless, Mr. Rowane could not recall how he applied the criteria in 1981.[10] (Tr. 835; Tr. 850; Tr. 882-84). In testifying about the hiring decisions, Mr. Rowane did not call upon his personal recollection, but upon notes made in preparation for his testimony several days before his appearance based solely upon his review of the applications eight years after the events. (Tr. 882-84). On a voir dire examination on the notes from which Mr. Rowane testified, the following exchange occurred:

> Q: Yes. And was your — your — the — information you wrote down based solely upon the application?
>
> A: Yes.
>
> Q: And not on your recall at all?
>
> (No response)
>
> You didn't have any independent recollection?
>
> A: Uh no, I couldn't remember things that far back.
>
> Q: Okay.

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10. Petitioner claims the record shows that Rowane made an independent judgment for each individual based upon whether or not they fulfilled the criteria which he had established. Tr. 1129. In addition, he testified that he never told any applicant that he would not a hire a woman and stated affirmatively that sex did not enter in any way into the determination to hire. Tr. 870, 843.

Appendix B

A: So I just took the application at face value, whatever information is on there —

Q: All right.

A: — and transferred it onto the worksheet.

Tr. 884.

Mr. Rowane testified that he could not state that he had applied the criteria during 1981. He stated that he did not "recall exactly how I looked at people in 1981 but my feeling now would be that if they were lacking in any one of [the criteria], I wouldn't consider them suitable." (Tr. 1122). In addition, Mr. Rowane didn't know whether Lawrence Cohen reviewed the applicants in terms of whether they were qualified under the criteria. (Tr. 1115). Mr. Rowane also testified that the "criteria" were just generally "in his head" when he conducted the interviews in 1981. (Tr. 1116-17). He did not compare the individuals with the criteria in any organized way (Tr. 1119-20), nor with other applicants when deciding whom to hire. (Tr. 1129). In response to a question whether the criteria "were required elements for applicants to have in order to be hired," Mr. Rowane testified: "I tried to indicate what I thought were the criteria that we would use in evaluating applicants . . . But it isn't as though there was any kind of rule established, where I would compare individuals against this rule to see whether they met it or didn't meet it. . . . or which one of them was more important than the other." (Tr. 1119-20).

The criteria were not fixed guidelines. No particular amount of prior factory or warehouse experience was

required. (Tr. 1111). For example, an applicant's education was not "relevant in all cases." (Tr. 1130-31). Moreover, an applicant's ability to perform heavy work was based on the applicant's own assessment (Tr. 1123) and on Mr. Rowane's judgement in view of the applicant's stature. Mr. Rowane considered whether the individual "looked big enough" and made "a subjective evaluation and I would have no fixed criteria in my mind to say that the cutoff point is here, I'd have no way of doing that." (Tr. 1126). The company did not test an applicant's ability to perform heavy lifting. (Tr. 1128).

The record also indicates that the company hired men who did not meet the criteria.[11] (Tr. 1120). In response to a question about the circumstances when an applicant's failure to meet the criteria did not disqualify him, Mr. Rowane testified:

> A: [I]n a case where the individual was interviewed by Lawrence Cohen, he would look at the individual and in some cases he would base his decision on the appearance — or not the appearance, the attitude that came through from the interview. And it was his company, he felt he was a good judge of people and he might hire people that wouldn't meet the criteria that I established after he died.
>
> Q: Uh-huh. Because they had a good attitude based upon the interview?

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11. Petitioner denies this fact.

> A: It may not be just attitude, it could be that the individual looked sincere and maybe he looked as though he would be a good worker and he came across to Lawrence Cohen as an individual that he felt he would want working in his plant.

(Tr. 1120-21).

Although LAI hired men in 1981 who had no factory or warehouse experience, it denied employment to some women who had factory experience; hired some men who did not have a steady employment history, but denied employment to women who did; and hired some men who did not seek permanent employment while denying employment to women who did. (PX9; PX10). During 1981, LAI also inconsistently used stature as a proxy for strength in determining whether applicants were able to perform heavy work. (PX9; PX10). For example, heavy lifting was rarely a requirement of the job in the seven departments where operatives were assigned other than the chemical processing department. (Tr. 1771-74).

The women applicants also testified that they would have stayed at LAI had they been hired and wanted the job to obtain the excellent benefits. For example, Erin Walters testified that when she applied to work at LAI, she "needed the money . . . wanted the benefits," and, would likely have "stayed a considerable length of time." (Tr. 17 - 18). Margaret O'Keefe Havemann testified that "everybody applied for a job with the intent that they are going to stay there," and that that was her intent when she applied to work at LAI.

(Tr. 49). Jacqueline Cox testified that, if LAI had hired her, she would have stayed at the job until she graduated from college in 1983. (Tr. 90, 102). Linda Nociforo testified that, if LAI had hired her, she "would have been there for quite some time because . . . the benefits were good." (Tr. 126). Yasmir Zafar testified that, just as she remained for four years at the job she found when LAI did not hire her, she would have stayed at LAI because she wanted to work. (Tr. 144). Dolores Gumbinsky testified that she "needed a good job" and "would have stayed as long as I was able to work." (Tr. 158). Maureen Keena testified that, in 1981, she was looking to establish herself "in a better job, a job where I could learn a trade." (Tr. 220). Ann Maly testified that she intended to stay at LAI when she applied for work. (Tr. 251). Joan Smith testified that, when she applied, she "was looking for a permanent position." (Tr. 279).

DISCUSSION

Pending before the Court are the parties' cross-motions for summary judgment. The petitioner LAI seeks a reversal of the Secretary's final order and requests an order entered stating (1) that the OFCCP's administrative complaint should be dismissed as imposing an illegal affirmative action plan establishing a quota of female hires; (2) that the OFCCP's administrative complaint is barred by the statute of limitations; (3) that the Secretary failed to sustain its burden of proving illegal gender discrimination; (4) that if discrimination is found, the Secretary's decision is arbitrary and capricious in modifying the initial determination of the ALJ insofar as the Secretary determined that female applicants would have worked until they were laid off and

in awarding prejudgment interest. Respondent OFCCP and the Secretary of Labor seek summary judgment dismissing the petition for review on the grounds that the Secretary's decision is supported by substantial evidence and is neither arbitrary, capricious nor an abuse of discretion in enforcing Executive Order No. 11246.

I. PETITIONER'S ARGUMENTS ON REVIEW

A. *Affirmative Action Plans in Government Contracts*

The petitioner LAI first argues that the final order of the Secretary must be reversed because the OFCCP's administrative complaint sought to impose an illegal affirmative action plan in the workplace. LAI bases this argument on several letters from OFCCP. First, on January 12, 1983, the Department of Labor sent LAI a letter stating that it had failed to make a good faith effort to recruit women into its workforce and to meet any of the goals in its 1981 affirmative action program in conformance with 41 C.F.R. § 60-2.12. As such, petitioner argues that the determination of the Secretary that six women should have been hired in 1981 establishes an illegal affirmative action requirement where no prior history of sex discrimination had been established. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511, 109 S. Ct. 706, 731 (1989).

As the government correctly points out, the administrative complaint filed by the OFCCP has nothing to do with LAI's failure to achieve a required quota or to meet the objectives of its affirmative action plan. The government concedes that the 1983 deficiency letter did cite,

among the twelve enumerated deficiencies, a failure to meet the goal of hiring six women into operative positions for that year. That deficiency, however, was resolved through conciliation without any litigation. The only deficiency not addressed through conciliation was whether LAI was failing to hire women as a result of a discriminatory personnel policy. In this regard, the OFCCP's administrative complaint filed with the Office of Administrative Law Judges referred only to the past pattern of discrimination and the enforcement proceeding was intended only to cover that aspect of the deficiency letter. Indeed, a review of the administrative record indicates that the determination of discrimination was focused solely on the allegations of intentional discrimination rather than the failure to comply with any affirmative action plan or quotas. Accordingly, petitioner's challenge to the Secretary's finding as an illegal affirmative action effort is without merit.

B. *Statute of Limitations for OFCCP Compliance Proceedings*

Petitioner also argues that the decision of the Secretary should be vacated because the compliance proceeding against LAI was initiated beyond the 180 day filing requirement under 41 C.F.R. § 60-1.21, which governs the filing of complaints with the OFCCP when an individual is aggrieved by discriminatory practices of a government contractor. Specifically, petitioner argues that the last female applicant applied to LAI on September 30, 1981 and the OFCCP administrative complaint was not filed until March 31, 1987, almost six years later.

The Court notes that ALJ Silverman explicitly rejected this argument in the R.D. & O. on the grounds that § 60-1.21's filing requirements are not applicable to the OFCCP when seeking compliance with government regulations. R.D. & O., at 2 n.2. The Court agrees. Section 60-1.21 refers solely to individual complaints filed with the OFCCP. The procedure for the OFCCP in commencing an administrative enforcement proceeding when a contractor violates E.O. 11246 is set forth in 41 C.F.R. § 60-1.26 and provides no statute of limitations. Rather, it provides that an administrative enforcement proceeding "may be made when violations [of the Executive Order] have not been corrected in accordance with the conciliation procedures in this chapter, or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate." Accordingly, petitioner's argument that the administrative proceeding was time-barred is without merit.

C. *Denial of Due Process*

Petitioner also argues that it was denied due process because the ALJ refused to allow LAI to cross-examine the government's investigator as to his conversations with female applicants who did not testify at the hearing. Tr. 518. LAI claims that had it been allowed to introduce evidence of the result of those interviews, that statements "would have indicated clearly and beyond doubt that the petitioner did not discriminate against these interviewees."

The Court fails to see how the ALJ's evidentiary ruling that the government's expert could not testify as to hearsay conversations with witnesses who would did not testify

constitutes a denial of procedural due process. LAI undoubtedly was aware of the names of these women, and has made no allegation that it was denied the opportunity to subpoena these women or take their depositions. *Cf. Richardson v. Perales*, 402 U.S. 389, 404, 91 S. Ct. 1420, 1429 (1971) (no denial of procedural due process in administrative judge's reliance on hearsay physician's report where plaintiff did not take advantage of opportunity to request subpoena of the physicians). Accordingly, the Court finds petitioner's procedural due process claim to be without merit.

D. *The OFCCP'S Burden of Proof*

Petitioner also urges that the Secretary erred in sustaining the finding of the ALJ that LAI had engaged in a pattern of discrimination. Petitioner argues that the government's witnesses offered self-serving statements whereas LAI's primary witness, John Rowane, was extremely credible and assumed a number of responsibilities as LAI's Equal Employment Opportunity Coordinator sometime after 1981.

The Government correctly points out that what petitioner is essentially seeking is a *de novo* review for a determination on the merits. Under the APA, however, that is not the proper standard for a court reviewing an agency determination. Rather, as the Government again correctly argues, the Secretary's determination that LAI engaged in a pattern of discrimination is to be reviewed under the substantial evidence standard. As such, the Agency's findings will not be overturned if there is "such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion," and may exist even if a court "could draw different conclusions from those drawn by the agency." *Local One, Amalgamated Lithographers of America v. National Labor Relations Board*, 729 F.2d 172, 175 (2d Cir. 1984) (citations omitted). Moreover, when the agency's factual findings are " 'based on the ALJ's assessment of credibility of witnesses, they will not be overturned unless they are hopelessly incredible or they flatly contradict either the law of nature or undisputed documentary testimony." *Kinney Drugs, Inc. v. National Labor Relations Board*, 74 F.3d 1419, 1427 (2d Cir. 1996) (citation omitted); *see also Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76, 81 (2d Cir. 1994) (credibility findings of ALJ are owed "special deference.").

The Government argues, and the Court agrees, that the ALJ's finding, adopted by the Secretary, that LAI had engaged in a pattern of gender discrimination in 1981 is supported by the substantial evidence in the record. As to the credibility of the female applicants, the ALJ credited their testimony that they either had been told that the jobs were not available to women, that the jobs were not appropriate for women or that they were not interviewed but men were. The Court has reviewed the testimony of these witnesses and simply cannot find that their testimony was "hopelessly incredible" or contradicted by any of the evidence other than the statements of Mr. Rowane, whose testimony the ALJ did not credit. In this regard, the Court has also reviewed the testimony of John Rowane and finds that there is nothing to overcome the special deference due the ALJ's determination not to credit his testimony. In addition, other evidence other than testimony supports the finding of a pattern of sexual discrimination. For instance, LAI's own

job advertisements specifically state that being a man is one of the job criteria. Although petitioner attempts to explain this reference as gender neutral, such an argument is utterly unpersuasive. The Court recognizes the general penchant to use the terms "he" "his" and "man" as gender neutral. It would stretch the Court's imagination too far, however, to find that a job advertisement that references being a "man" as a hiring criteria is intended to be gender neutral. If the position was truly intended to attract both men and women, there would have been no reference to gender at all. The Court also cannot escape the undisputed statistical evidence that 0% of the female applicants were hired that year, while 20% of the men were. Moreover, LAI's president interviewed 40% of the male applicants, but none of the female applicants. Accordingly, the Court finds that the Secretary's finding that there was a pattern of sexual discrimination is supported by the substantial evidence in the record.

E. *The Secretary's Remedial Decision*

The petitioner also argues that the decision of the Secretary modifying the ALJ's recommended remedy was an abuse of discretion and was arbitrary and capricious because he unfairly calculated the median length of employment of male employees and improperly imposed an award of prejudgment interest on the backpay award.

1. *Calculation of Back Pay*

LAI argues that it was error to calculate the back pay award on the assumption that female applicants, unlike male applicants, would have worked until the company-wide

layoffs. As to this claim, petitioner argues that its expert Dr. Gary Simon testified before the ALJ that the median time on the job for the men who were hired in 1981 was 12 ½ weeks. In addition, petitioner argues that the ALJ made a decision based on his assessment of the female witnesses as to the length of their potential employment and that it was an abuse of discretion not to use his back pay calculation.

The Secretary rejected the median length of employment approach on the grounds that there was no evidence in the record showing that specific women applicants would have left work for LAI before being involuntarily laid off in 1983. As such, the Secretary properly relied on *Rios v. Enterprise Ass'n Steamfitters Local Union 638*, 860 F.2d 1168, 1176 (2d Cir. 1988), and resolved all ambiguities in favor of the employees and found that the affected class was entitled to the presumption that they would have continued to work until they were laid off or terminated for nondiscriminatory reasons. The Secretary concluded, therefore, that the backpay period would be based on the median date of hire for men in 1981 through the median date of discharge of the 41 men who were involuntarily laid off in 1983 when LAI closed.

As an initial matter, there is no dispute that backpay is an appropriate remedy where an employee has been injured because of the action or inaction of her employer. As stated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19, 95 S. Ct. 2362, 2372 (1975), "where a legal injury is of an economic character, [t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury [and] the injured party is to be placed, as near as may be, in the situation he [or she] would

have occupied if the wrong had not been committed." *Id.* (internal quotation marks and citation omitted). Furthermore, difficulty in calculating a backpay award does not constitute a circumstance which warrants the denial of backpay. *Cruz v. Local Union Number 3 of the International Brotherhood of Electrical Workers*, 34 F.3d 1148, 1157 (2d Cir. 1994) (citing *Moody*, 422 U.S. at 421, 95 S. Ct. at 2373) ("[B]ackpay should be denied only for reasons which . . . would not frustrate the central statutory purpose [of the legislation] of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination.").

As the Second Circuit has also found, in determining whether there has been an abuse of discretion in fashioning the backpay remedy, courts are guided by general principles pertinent to Title VII backpay awards. *Rios*, 860 F.2d at 1175 (citing *Berkman v. City of New York*, 705 F.2d 584, 594 (2d Cir.1983) (while district court has broad power to fashion relief, its discretion is bounded by purposes of Title VII)). Since the object of compensatory relief under Title VII is to make the victim whole, courts must "as nearly as possible, " 'recreate the conditions and relationships that would have been had there been no' " unlawful discrimination." *Id.* at 1175-1176 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 372, 97 S. Ct. 1843, 1873 (1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769, 96 S. Ct. 1251, 1266 (1976) (in turn quoting *Local 60, United Bhd. of Carpenters and Joiners v. NLRB*, 365 U.S. 651, 657, 81 S. Ct. 875, 879 (1961) (Harlan, J., concurring))). It also follows from the "make whole" purpose that "such remedy as is given should not constitute a windfall at the expense of

the employer." *Id.* at 1176 (quoting *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 812 (2d Cir.), *cert. denied*, 464 U.S. 937 (1983)).

As the Secretary correctly found, once it was determined that the 28 women applicants were victims of a pattern of sexual discrimination in LAI's hiring practices, any " 'uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party].' " *Rios*, 860 F.2d at 1176 (citations omitted). The Court has reviewed the record and also notes that there was no evidence regarding the 28 applicants to suggest that they would *not* have worked until the company layoffs in 1983 had they not been subjected to LAI's unlawful hiring practices. The Court finds, therefore, that the Secretary did not abuse his discretion in determining that the victims should be entitled to a backpay period beginning with the average date of hire and concluding with average date of layoff in 1983.

It should also be noted that the Secretary, in the exercise of his discretion in fashioning a remedy, was also fair in other respects. In favor of the women, the Secretary determined that the ALJ's backpay award should have include shift differentials, periodic wage increases and fringe benefits. This finding is completely consistent with the remedial goal in employment discrimination cases discussed above of making the victims "whole." *See Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 145 (2d Cir. 1993) (backpay award should include lost salary as well as anticipated raises and fringe benefits), *cert. denied*, 510 U.S. 1164 (1994). In favor of the petitioner, the Secretary also

reasonably found that the record did not support a finding that all women would have been hired, and altered the backpay award to reflect a total amount based on an equal percentage of women that were hired as were men. Because 20% of the men were hired, the backpay award should reflect an amount based on 20% of the women, or 6 women, working until lay offs occurred in 1983.

2. *Prejudgment Interest*

LAI further asserts that the decision awarding prejudgment interest must be reversed. The basis for this argument is that ALJ Silverman originally determined that prejudgment interest was not warranted because (1) while there was discrimination, it was not the "pernicious" type of ethnic discrimination warranting this relief; (2) there was no fixed amount of lost wages and the back pay award, while warranted, was speculative; and (3) LAI did not act in bad faith. LAI further adds that prejudgment interest is unfair because of the Secretary's and the OFCCP's delay in the conciliation and review efforts. Specifically, OFCCP did not file its administrative complaint until six years later in March 1987, the case was not heard for another two years in January 1989, concluded on April 1, 1989 and a decision was not rendered until two years later on May 30, 1991. It then took the Secretary an additional three years to issue the decision to remand on June 15, 1994 and it was not until a year and a half later on November 9, 1995 that a final decision from the Secretary was issued adopting Judge Vittone's July 27, 1995 decision. Thus, LAI argues that it should be not charged with fourteen years of prejudgment interest.

Appendix B

The Court finds petitioner's arguments to be without merit. First, there is no abuse of discretion in awarding prejudgment interest on an award of backpay in an employment discrimination case. Under the regulations accompanying the E.O., interest on backpay awards derived from enforcement proceedings is specifically authorized. *See* 41 C.F.R. § 60-1.26. Moreover, in the employment discrimination context, the Second Circuit has held that "it is ordinarily an abuse of discretion *not* to include pre-judgment interest in a back-pay award." *Saulpaugh*, 4 F.3d at 145. Given that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded. *Id.* The Supreme Court has made clear as well that bad faith is not a required element in making the victim of discrimination whole through an award of backpay with interest. *Moody*, 422 U.S. at 422, 95 S. Ct. at 2374. Accordingly, the Court finds that the Secretary's determination that prejudgment interest was appropriate is not an abuse of discretion.

Second, although there was a delay in the proceedings, the petitioner does not deny that prior to the filing of the administrative complaint, LAI and the OFCCP were engaged in ongoing conciliation efforts. Moreover, LAI has had the benefit of using the monies that otherwise should have been paid to the victims years ago. The Second Circuit very recently rejected an argument similar to LAI's in *Securities and Exchange Commission v. Warde*, No. 97-6190, 1998 WL 406851 (2nd Cir. July 8, 1998). In that case, the defendant objected to a district court's award of $1.2 million in prejudgment interest because the SEC was "ultimately responsible" for the nine-year delay in bringing the

underlying securities enforcement action. The Second Circuit found the argument to be without merit because "[e]ven if . . . litigation was protracted through some fault of the [the government]," the award of prejudgment interest for the entire period is proper because 'defendant . . . had use of unlawful profits for the entire period.' " *Id.* at * 8 (citing *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996)). Indeed, the purpose of prejudgment interest in an employment discrimination case is to prevent an employer from attempting "to enjoy an interest-free loan for as long as it can delay paying out back wages." *Clarke*, 960 at 1154 (citation omitted). Accordingly, the Court finds there was no abuse of discretion or unfairness to LAI in awarding the prejudgment interest on the backpay award.

3. *Debarment from Future Contracts*

Although it appears that this remedy is no longer an issue in this case, it should be noted as a final matter that the Secretary was within his discretion to order that LAI would be debarred from future government contracts if payment of the award was not promptly made. The E.O. and its implementing regulations specifically provide the Secretary with the authority to issue such a debarment order. *See* E.O. § 209(a)(2); *see also* 41 C.F.R. § 60-1.27 ("A contractor may be debarred from receiving future contracts . . . for any violation of Executive Order 11246.").

CONCLUSION

For the foregoing reasons, petitioner's motion for summary judgment is denied, respondent's cross-motion for

summary judgment is granted and the decision of the Secretary is affirmed in all respects. The Clerk of the Court is directed to mark this case as closed.

SO ORDERED.

s/ Joanna Seybert
Joanna Seybert, U.S.D.J.

Dated: Uniondale, New York
August 7, 1998

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AND FILED AUGUST 12, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 95 - 5377 (JS)

LAWRENCE AVIATION INDUSTRIES, INC.,

Petitioner,

– against –

RICHARD REICH, SECRETARY OF LABOR,

Respondent.

JUDGMENT

A Memorandum and Order of Hon. Joanna Seybert, United States District Judge, having been filed on August 7, 1998, denying petitioner's motion for summary judgment; granting respondent RICHARD REICH, SECRETARY OF LABOR's motion for summary judgment; and affirming the decision of the SECRETARY OF LABOR of November 9, 1995, which found that petitioner had engaged in a pattern of intentional gender discrimination and awarded backpay in the aggregate amount of $74,577.67, prejudgment interest in the amount of $105,559.16, and ordered petitioner to make payment within 60 days or be debarred from future government contracts, it is

Appendix C

ORDERED AND ADJUDGED that the decision of the SECRETARY OF LABOR of November 9, 1995, which found that petitioner had engaged in a pattern of intentional gender discrimination and awarded backpay in the aggregate amount of $74,577.67, prejudgment interest in the amount of $105,559.16, and ordered petitioner to make payment within 60 days or be debarred from future government contracts, is affirmed.

Dated: Uniondale, New York
August 12, 1998

ROBERT C. HEINEMANN
Clerk of the Court

By: s/ Joseph Di Talia
JOSEPH DI TALIA
Deputy Clerk-in-Charge

APPENDIX D — FINAL DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR DATED NOVEMBER 9, 1995

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: November 9, 1995
CASE NO. 87-OFC-11

IN THE MATTER OF

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEPARTMENT OF LABOR,

PLAINTIFF,

v.

LAWRENCE AVIATION INDUSTRIES, INC.,

DEFENDANT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

I remanded this case to the Administrative Law Judge (ALJ) on June 15, 1994 to recalculate back pay due an affected class of women. The ALJ submitted a Recommended Decision and Order (R. D. & O.) on Remand on July 27,

1995 and the parties have filed exceptions to the R. D. & O. and responses to exceptions.

The R. D. & O., exceptions and responses to exceptions have been thoroughly reviewed. The exceptions are without merit. I adopt the R. D. & O. in its entirety (copy attached).

SO ORDERED.

s/ [illegible]
Secretary of Labor

Washington, D.C.

APPENDIX E — DECISION AND REMAND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR DATED JUNE 15, 1994

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: June 15, 1994
CASE NO. 87-OFC-11

IN THE MATTER OF

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF,

v.

LAWRENCE AVIATION INDUSTRIES, INC.

DEFENDANT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. and O.) in this case under Executive Order No. 11,246, 3 C.F.R. 339

(1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e note (1988), finding that Defendant Lawrence Aviation Industries, Inc. (LAI) discriminated against applicants for employment on the basis of sex in 1981 when it failed to hire any of 28 women but hired 175 men in entry level unskilled and semi-skilled positions. R. D. and O. at 11-13. Although he rejected both parties' formulas for award of back pay, the ALJ recommended award of $2,000 to each of the 28 rejected women applicants,[1] *id.* at 15, but denied award of prejudgment interest. *Id.* at 15-16. He did not discuss whether enhancements to straight time pay and fringe benefits should be included in the back pay award. Finally, the ALJ rejected OFCCP's request that LAI be debarred from future government contracts. *Id.* at 17.

Both parties excepted to the R. D. and O. LAI argued that, on the record as a whole, the ALJ erred in finding that LAI discriminated against women in hiring, and that the ALJ's method for calculating back pay was improper. OFCCP also excepted to the ALJ's formula for calculating back pay and to the failure of the ALJ to include fringe benefits and interest in the back pay award. In addition, OFCCP excepted to the denial of its request for debarment of LAI.

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1. The ALJ also recommended that the back pay be held in an interest bearing account for six months to give the parties an opportunity to locate the class members, but if any woman cannot be found, that portion of the back pay should be returned to LAI. R. D. and O. at 18; see discussion below at 11-12.

Appendix E

I- Background

Lawrence Aviation Industries manufactures titanium sheet and plate at its facility in Port Jefferson Station, Long Island, N.Y., T. (Transcript of hearing) 1692-93; 1676, and sells its product to a number of government contractors for use in manufacturing aircraft sold to the federal government. T. 1680. LAI assigns newly hired unskilled blue collar workers to the general factory helper position in which they could be assigned to any department. T. 837-38. LAI selected applicants for hire on the basis of an application and an interview applying four criteria: 1) factory or warehouse experience, 2) a steady work, education, or training history, 3) ability to do heavy work, and 4) interest in becoming a permanent employee. P (Plaintiff's Exhibit) - 3(b).

LAI hired 175 men in "operative" positions in 1981 out of 849 men who applied, or 20.6 percent, but hired no women out of 28 who applied that year. P-11, Tab 1981. From 1975 to 1981, LAI hired 1,020 men out of 5,077 men who applied, 20 percent, but hired only two women out of 225 who applied, or less than one percent. P-11; R. D. and O. at 7.

II- Hiring discrimination

The ALJ found on "the record as a whole . . . that [LAI] engaged in a pattern or practice of sex discrimination by treating women unequally with men and failing to consider them for entry level jobs in 1981." R. D. and O. at 13. The record in this case has been reviewed and I agree with and adopt the ALJ's conclusion. Statistics such as those set forth

above are sufficient to establish a prima facie case of discrimination. *United States Dep't of Labor v. Honeywell, Inc.*, Case No. 77-OFCCP-3, Sec'y. Dec. and Remand Order March 2, 1994, slip op. at 7 and cases cited therein.[2] In addition, the ALJ apparently credited the testimony of several women who applied in 1981 that they were told by the interviewer that entry level factory jobs were not open to women, or that they were not interviewed when men who applied after they did were interviewed and hired. R. D. and O. at 7.

I also agree with the ALJ's rejection of LAI's rebuttal that each of its hiring decisions was based on legitimate, nondiscriminatory criteria. As the Secretary noted in *Honeywell*, mere "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." Slip op. at 11 (internal quotation marks excluded). Several facts in the record belie LAI's rebuttal.

To begin with, LAI did not apply its asserted hiring criteria uniformly to men and women. For example, it hired a number of men who had no factory or warehouse experience, but denied employment to some women who had factory experience because it involved light or sedentary

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2. Applying the methodology in *Honeywell*, *id.*, n.9, the number of standard deviations between the actual number of women hired, none, and the expected number, six (total number of applicants hired, 175, divided by total number of applicants, 877, times the number of women applicants), is 2.9, which is sufficient to establish a prima facie case of discrimination.

work; hired some men who did not have a steady employment history, but denied employment to women who did; and hired some men who did not seek permanent employment while denying employment to women who did. See, e.g., the following applications, P-9, of men hired as general factory helpers: Frank Angiletti (pie man in a pizza parlor, golf cart mechanic and salesman); Rory Cameron (three months as a maintenance man at a rental tool shop); Wayne Evans (four months' experience as a lathe operator); Kevin Hanlon (stock clerk in a department store and kitchen helper); Michael Murphy (laboratory assistant, maintenance man at a golf club, supermarket clerk); John Polascek (two summer jobs as a custodian, gas station manager); Mitchell Purvis (nine months experience as a bus boy, dishwasher, server and set up man at a steak house); Charles Rentsch (two summers as an assistant in his father's business, seeking summer work only to return to college in the fall). Some of the women denied employment had factory or warehouse type experience and steady work histories. See, e.g., applications, P-10, of: Sara Bueno (three years' experience as sewing machine operator at two garment manufacturers and over a years' experience as a packer and merchandise checker in factories); Olga Colon (seven years' experience in factories, including operating a plastic molding machine); Bertha Johnson (two years experience as a factory machine operator); Maggie Johnson (four years' experience as a factory machine operator and packer); Mary Keene (two years' experience as a factory machine operator, assembler and inspector); Anna Maly (three years' experience as a factory machine operator and assembler).

Assuming LAI applied its hiring criteria evenhandedly,[3] the disproportionate impact of those criteria on men and women placed the burden on LAI of showing that its criteria constituted a valid selection practice having a "manifest relationship to the employment." *Honeywell*, slip op. at 12, quoting *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1435 (9th Cir. 1984), *mod.*, 742 F.2d 520. LAI offered no evidence of the validity of its standards for hiring in entry level jobs other than the testimony of John Rowane, the Personnel Manager, who interviewed almost all the applicants in 1981. Mr. Rowane characterized the work of a general factory helper as hard, hot, heavy work requiring physical stamina. T. 941-42. To evaluate the ability of applicants to perform those duties, he only asked them if they had a problem with heavy work and made a subjective judgment about the stature of the applicant, that is, whether they "looked big enough and strong enough to handle [it]." T. 1123, 1126. Mr. Rowane's testimony shows that LAI used height and weight as a proxy for ability to perform heavy work. See, e.g., T. 801; 846; 868; 890-92; 894; 899; 902.[4]

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3. I note that LAI's own job descriptions did not require any prior experience or training for the position Heat Treater and Metal Cleaner, P-4, the job to which 87.5 percent of the men hired as general factory helpers in 1981 were assigned. P-6; T. 315.

4. LAI did not even apply its height and weight criteria uniformly to men and women, hiring a number of men whose "stature" was about the same as or smaller than that of women denied employment. Compare, e.g., the applications of Charles Gonzalez (5'5", 135 lbs.), Dennis Guerra (5'8", 138 lbs.), William Haines (5'7", 140 lbs.), Joseph Loria (5'7", 130 lbs.), Edward Nieves (5'7", 130 lbs.), Joseph Recupero (5', 125 lbs.), P-9, with the applications of

(Cont'd)

He did not administer any tests to evaluate ability to lift heavy objects. T. 1128.

Weight lifting restrictions on jobs open to women, and minimum height and weight requirements for heavy or strenuous work which have a disproportionate impact on women, have been rejected for a quarter century under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988). See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) (Height and weight requirements have disproportionate impact on women and must be validated as correlated with strength essential to good job performance); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 718 (7th Cir. 1969) ("[T]here is no general agreement as to what is a maximum permissible weight which can be safely lifted by women" and "it is best to consider individual qualifications and conditions, such as the physical capability and physiological makeup of an individual, climatic conditions, and the manner in which the weight is to be lifted." Footnote omitted); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969) ("[U]sing these class [sex] stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.")[5] I find that LAI discriminated against women in

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(Cont'd)
Barbara Abramowski (5'6", 145 lbs.), Elizabeth Bermel (5'8", 140 lbs.), Gloria Hill (5'7", 165 lbs.), Melinda Johnson (5'7.5", 153 lbs.), Sandra Sutherland (5'7", 155 lbs.)

5. LAI introduced a report by the Department of Health and Human Services, "Work Practices Guide for Manual Lifting," March, 1981, which states at page 91 "[s]tereotypes base on age, gender, and body weight have all been shown to be only weakly correlated with physical capability to exert high forces."

hiring into the entry level general factory helper position in 1981.

III- Relief.

A- Back pay.

The ALJ rejected both parties' proposed methods for calculating back pay[6] and developed his own. He multiplied the starting salary for factory helpers, $4 an hour, or $160 a week, times the "median time on the job" for all 175 men hired in 1981 of 12.5 weeks, and held that the resulting figure, $2,000, should be paid to each member of the affected class. The ALJ limited back pay to the "median time on the job" on the assumption that women would have the same overall longevity on the job as men, and relied on the testimony of LAI's expert witness to arrive at 12.5 weeks. R. D. and O. at 15. Both parties excepted to the ALJ's calculation of back pay.

OFCCP objected to the ALJ's use of the "median time on the job" of all 175 men hired in 1981 to calculate back pay. I agree that, in the absence of evidence in the record showing that specific women applicants would have left work for LAI before being involuntarily laid off, for example, by moving out of the area or becoming incapacitated for non-work related reasons, members of the affected class are entitled to a presumption that they would have continued to work until they were laid off or terminated for

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6. The ALJ described each parties' proposed back pay methodology at p. 14 of the R. D. and O.

nondiscriminatory reasons. *See, e.g., Wooldridge v. Marlene Industries, Corp.*, 875 F.2d 540, 547 (6th Cir. 1989) (employer has burden to show lost time due to reason other than discrimination); *Rios v. Enterprise Ass'n of Steamfitters Local 638*, 860 F.2d 1168, 1176 (2d Cir. 1988) (uncertainties in calculating back pay should be resolved against discriminating party). I also agree with OFCCP that back pay should include shift differentials, periodic wage increases and fringe benefits. *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626-27 (6th Cir. 1983), *cert. denied, Michigan Dept. of Mental Health v. Rasimas*, 466 U.S. 950 (1984).

I cannot agree, however, that each and every member of the affected class is entitled to the full back pay she would have earned if she had been hired because there is no basis in the record to assume that every member of the class would have been hired. Absent discrimination, it is reasonable to assume only that women would have been hired in the same proportion as the total number of women applicants bore to the total applicant pool. For example, in *Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980), where a union's selection criteria had a disproportionate impact on black applicants for the apprentice program, the court held that back pay should be based on "an estimation of the number of apprentice positions that were denied black applicants by reason of the discriminatory policies. . . . Under a nondiscriminatory selection policy, the proportion of total applicants who were black . . . would approximate roughly the proportion of admittees who would have been black . . . ." 637 F.2d at 520. *See also OFCCP v. Lasko Metal Products,*

Inc., Case No. 87-OFC-00009, Sec'y. Dec. and Order Aug. 31, 1992, slip op. at 7-9, and cases discussed therein. Here, women were about three percent of the total applicant pool (28/877=0.032), so that under a nondiscriminatory selection system, about three percent of all hires, six women, would have been hired in 1981 (0.032 X 175=5.6).

It is not possible to determine which of the six women out of the 28 women applicants would have been hired, when they would have been hired, or when they would have been laid off. OFCCP's approach of using, for comparison, men hired within a two week period before and after the date each of the 28 women was denied employment is not appropriate. The period for back pay should run from the median date of hire of the 175 men actually hired to the median date of discharge of the 41 men involuntarily laid off, and the amount of back pay should be equal to the gross earnings of the latter 41 men reduced to an equivalent hourly wage times the total number of hours which would have been worked by six women between those dates. That gross amount of back pay should be divided equally among all 28 women. *Hameed*, 637 F.2d at 521 and n.19.

B- Interest

I agree with OFCCP that the ALJ's reasons for denying prejudgment interest should be rejected. R. D. and O. at 15-16. Nothing in the Executive Order or the regulations shows that discrimination on the basis of sex should be treated any differently than race, color, religion or national origin discrimination. *See* E.O. 11,246, Section 202(1); 41 C.F.R. § 60-1.4(a)(1) (1993). The purpose of back pay is to

vindicate the government's interest in the nondiscrimination obligations of the contract by making whole, as nearly as possible, those who have been discriminated against. Interest "assures 'complete compensation.' " *OFCCP v. Washington Metro Area Transit Auth.*, Case No. 84-OFC-8, Acting Ass't. Sec'y. Final Decision and Remand Order Mar. 30, 1989, slip op. at 28 (quoting *West Virginia v. United States*, 479 U.S. 305, 312 (1987)), *rev'd on other grounds Washington Metro Area Transit Auth. v. DeArment*, 55 Empl. Prac. Dec. ¶ 40,507 (D.D.C. 1991). Whether or not the contractor acted in bad faith is irrelevant because the purpose of back pay and interest is to compensate victims of discrimination for their economic losses, not to punish wrongdoing contractors. *Cf. Albemarle Co. v. Moody*, 422 U.S. 405, 422 (1975); *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55, 58 (2d Cir. 1984) ("[I]nterest . . . serves [a] compensatory purpose by making up for the delay in receiving the money, during which time the employees were denied its use, and by partially offsetting the reduction in the value of the delayed wages caused by inflation.") Interest shall be assessed on all back pay due as provided in 29 C.F.R. § 20.58 (1993), from the date back pay liability accrued to the date it is paid. *Lasko Metal Products*, slip op at 9-10.

C- Refund of Undistributed Back Pay

The ALJ ordered LAI to establish an interest bearing account into which should be deposited all back pay due members of the affected class who could not be located. If these women could not be located after six months, these funds were to be returned to LAI. OFCCP excepted to the time limit of six months in which to locate six members of

the affected class who had not been located at the time of the hearing. It argued that time was not sufficient and urged me to extend it to 12 months.

The ALJ did not cite any basis either in the Executive Order, the regulations or by analogy to other labor standards laws for return of undistributed back pay to the defendant in an Executive Order 11,246 enforcement action. He also did not explain how that procedure would advance the government's interests in enforcement of the Executive Order. I find it would not be appropriate here and I reject that provision of the ALJ's Recommended Order.

Where nothing in the Executive Order or the regulations addresses a particular problem, instructive analogies can be found in the administration of other programs, such as the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988). *See, e.g., OFCCP v. Disposable Safety Wear, Inc.*, 59 Fair Empl. Prac. Cas. 1597, 1600 (Sec'y. Dec. Sep. 29, 1992). Under that Act, if employees entitled to back pay cannot be found, the money "remain[s] on deposit with the Treasurer of the United States subject to withdrawal, by court order, on a petition by a claimant." *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971); *Donovan v. University of Texas*, 643 F.2d 1201, 1208 n.16 (5th Cir. 1981).

Considering the interests of Defendant and the government, I can find no basis for return of undistributed back pay funds to LAI. Defendant has been found in violation of the Executive Order, a finding which in effect created a debt due the government by LAI. *OFCCP v. Washington Metro Area Transit Auth.*, Case No. 84-OFC-8, Ass't. Sec'y.

Appendix E

Order Denying Motion to Amend, Nov. 17, 1989, slip op. at 6. LAI therefore has no legal or equitable claim to the back pay funds. In addition, if a defendant in an Executive Order enforcement proceeding can obtain a refund of undistributed back pay, it would have an incentive to delay the matter as much as possible until members of the affected class cannot be found. Undistributed back pay funds will be deposited with the Treasurer of the United States to be held for missing members of the affected class or their personal representatives. Such funds may be disbursed upon petition by a claimant to the Office of Administrative Law Judges. OFCCP's exception to this provision of the ALJ's recommended order is denied as moot.

V- Sanctions.

OFCCP excepted to the ALJ's denial of its request for imposition of the sanctions in §§ 209(a)(5) and (6) of the Executive Order. I agree that the ALJ's reasons for denying sanctions are not appropriate. The Secretary held in *Lasko Metal Products* that:

> [t]he usual practice in cases under the Executive Order where a violation has been found [ ] has been to give the defendant a reasonable period of time to come into compliance on the specific violation(s), and to order cancellation of contracts and debarment if the defendant has not demonstrated compliance within that time. . . . *When so framed, the final administrative order encourages compliance and is not punitive* . . . .

Slip op. at 11-12. (Emphasis added). *See also OFCCP v. Disposable Safety Wear, Inc.*, 59 Fair Empl. Prac. Cas. at 1599.

The Department of Labor has the discretion under the Executive Order, rather than debar a sole source contractor, to refer a matter to the Department of Justice for appropriate action. E.O. 11,246, § 209(a)(2); 41 C.F.R. § 60-1.27. The fact that the violations occurred in 1981 does not relieve LAI of its obligation to meet its contractual obligations by providing relief to members of the affected class. Without the threat of sanctions, there would be no means to assure payment of the back pay. If the ALJ's recommended order recalculating back pay is adopted by the Secretary, LAI will have 60 days to comply or it will be debarred. If my order did not include this provision for debarment and LAI did not comply, it would be necessary to enter another order imposing sanctions. My order today thus accomplishes in one step what might otherwise require two.

Accordingly, this matter is REMANDED to the ALJ to recalculate back pay in accordance with the discussion above and to issue a supplemental recommended decision limited to that point within 60 days of the date of this Order. If either party disagrees with the ALJ's supplemental decision, it may file a brief, not to exceed 10 double spaced typed pages, within 30 days of receipt of the ALJ's supplemental recommended decision. No further briefing will be permitted.

SO ORDERED.

s/ [illegible]
Secretary of Labor

Washington, D.C.

APPENDIX F — RECOMMENDED DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR DATED MAY 30, 1991

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D. C. 20036

DATE: May 30, 1991
CASE NO: 87-OFC-11

IN THE MATTER OF

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Plaintiff,

v.

LAWRENCE AVIATION INDUSTRIES, INC.

Defendant.

* * *

Before: AARON SILVERMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Appendix F

Statement of the Case

I.

This proceeding arises under Executive Order 11246 (EO), as amended, and the regulations promulgated pursuant to its authority at 41 C.F.R. Chapter 60. The EO and regulations prohibit employment discrimination by Federal Government contractors[1] based on race, color, religion, sex, or national origin. Section 202(a) of the EO also requires Federal Government contractors to take affirmative action to ensure that employees and job applicants are not discriminated against and are treated fairly with regard to all terms and conditions of employment.

The Department of Labor (DOL), the Plaintiff, instituted an enforcement proceeding through the Office of Federal Contract Compliance Programs (OFCCP), by filing an administrative complaint on April 9, 1987. Violations of the EO were found after a compliance review conducted by OFCCP in 1982.[2] OFCCP alleges that Lawrence Aviation

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1. "Contractors", unless otherwise indicated, means a prime contractor or subcontractor. "Subcontractor" means any person holding a subcontract and, for the purposes of Subpart B of Part 60-1 (Obligations of Contractors and Subcontractors), any person who has a subcontract subject to the order. The term "First-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor. 41 C.F.R. =60-1.3

2. The issue of limitations raised for the first time in the Company's Brief, does not apply to agency complaints following compliance reviews. 41 C.F.R. § 60-1.20 *et seq.*

Industries, Inc., the defendant, hereinafter the Company, intentionally failed to hire women into entry level positions in 1981 because of their gender. OFCCP's compliance review of the Company disclosed 12 deficiencies of the EO, of which 11 involved affirmative action deficiencies and one of discrimination. The parties met six times in attempts to conciliate the deficiencies, resulting in the resolution of the 11 affirmative action deficiencies. (TR-364, 370)[3].

The administrative complaint alleges that, as a government contractor[4], the Company violated EO 11246

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3. The following abbreviations are used in this Decision and Order:

> **TR-**, the transcript of hearing; **TR 1/30-**, refers to January 30th transcript because the transcripts for January 30th and January 31st inadvertently begin at page 1.
>
> **PX-** and **DX-**, refer to Exhibits of the Department of Labor **(PX)** and Lawrence Aviation **(DX)**

4. The Company argues that EO 11246, under §2000.e of Title 42 of the United States Code, places the burden of enforcing compliance with the civil rights law upon the contractor. This argument has no merit. EO 11246 requires that all nonexempt Federal Government contracts and subcontracts contain a standard equal opportunity clause which expressly requires that contractors agree to comply with the provisions of the EO and the rules, regulations, and orders of the Secretary of Labor issued thereunder. 41 C.F.R. 60-1.4(a). In the absence of a contractor's or subcontractor's express agreement to comply with the EO, it would still be bound by the (Cont'd)

by failing to hire any of 28 females who applied for entry level blue-collar positions in 1981. For the alleged discrimination against the affected class, OFCCP seeks: (1) to have the Company enjoined from engaging in discriminatory practices, and to provide back pay to the victims of discrimination; and (2) the cancellation of all the Company's subcontracts with the Government and debarment from future contracts until DOL is satisfied that it has complied with EO 11246 including the payment of the back pay.

The Company denied the charges in the complaint and as affirmative defenses argues: (1) that it had an affirmative action program which complied with the requirements of the law and had not at any time discriminated against anyone because of race, color, religion, sex or national origin; (2) that the U.S. Department of Labor or this Court has no jurisdiction over the issues raised.[5]

(Cont'd)
regulations which provide that the equal opportunity clause is considered part of every contract whether or not the contract is written or the clause is physically incorporated in the agreement. 41 C.F.R. 60-1.4(e).

5. This Court has jurisdiction in this action under the authority of §§ 208 and 209 of Executive Order 11246, and the rules and regulations issued pursuant thereto, specifically Title 41, Code of Federal Regulations, Part 60-30 and § 60-1.26.

Appendix F

II.

The Company is a family owned corporation formed in 1959. It is located in Port Jefferson Station, Suffolk County, Long Island, New York, and is a successor-in-interest to Ledkote Products Company of Long Island. Ledkote Products was the principal east coast manufacturer of stainless steel exhaust systems for military airplanes which the Company continues to manufacture.

In 1965, the Company began producing titanium alloy sheet and is one of its three producers in the United States. Titanium is a light weight, heat resistant metal, used in building jet aircraft. Titanium alloy sheet is manufactured by melting titanium sponge into ingots. During this process the material reaches 1750 degrees F. The ingots are forged into slabs, which are then conditioned and sent to Jessup Steel where they are rolled down to 1/8 inch sheet bars and returned to the Company. After a sheet bar is cut, it goes through several operations on various mills to be rolled down into sheets which are cleaned, annealed, milled, and grinded.

As it was in 1981, the Company is a subcontractor for prime Government contractors, including Grumman, Pratt and Whitney, Lockheed, Northrup, Boeing, and McDonald Douglas Aircraft. It is the sole supplier for stringers for the F-14 aircraft produced by Grumman and is the world-wide source of 8% manganese titanium, an alloy used on all present inventory of aircraft.

A fire destroyed a large part of the plant in 1979, requiring the Company to lay off half of its employees.

Appendix F

Rebuilding was not completed until the latter part of 1980, and in 1981, the Company began hiring again.

To fill entry level blue-collar jobs, the Company periodically advertised in Newsday, a local newspaper, particularly when there was a heavy demand for personnel and it needed a large number of people; posted a notice on the billboard outside the plant; and contacted the New York State Department of Labor. The Company described itself as an equal opportunity employer hiring men and women.

Applicants for entry level blue-collar openings who did not fall into skilled categories, occupations for which apprenticeships were generally required, fell into the Company's operative category. The operative job category, a classification used by the Equal Employment Opportunity Commission, is a broad category of workers who operate machines or process equipment or perform other factory type duties with skills that can be mastered in a few weeks and require limited training. (DX-108).

Entry level blue-collar operatives were hired by the Company to start working as general factory or maintenance helpers. They served a 30-day probationary period during which they were assigned to various jobs in the factory as needed. At the end of the 30-day period, the new employees were assigned to one of the positions contained in the collective bargaining agreement. (PX-3B). All employees, except for administrative, supervisory staff and foremen became members of the International Association of Machinists. Job seekers were usually interviewed the day they applied for work. If a vacancy existed, a person would

be advised at the time he applied that he was hired, subject to a physical examination.

In 1981, the Company hired 175 of 849 male applicants for operative entry level blue-collar jobs while denying employment to all 28 female applicants. (TR-33; PX-11).

Fifteen of the 28 female applicants testified at the hearing in this matter. Most of them said that they applied for a job with the Company in response to the newspaper advertisement, and, in substance, each said that in applying for work, she filed an application at the plant, was interviewed for five or ten minutes, but was never offered a job. (TR 1/30- 19, 59, 133-135, 160-161; TR- 8, 10, 11, 40-44, 76, 86, 90-94, 117, 136-139, 153-154, 169-172, 212-13, 241, 274).

Because of economic conditions, the Company began laying off employees in November 1981, and by the end of 1983, all but two of the 175 men hired as general factory workers were laid off.

During OFCCP's compliance review, Rickie Lampkin, OFCCP's area director, found that the Company's purported criteria for hiring entry level blue-collar applicants were not uniformly applied. (TR-310). He found that some of the females exceeded the alleged entry requirements while some of the men who were hired, either did not meet the applicable criteria, or had less of the required qualifications than some of the females. Those disparities were also observed by Geraldine Jones, an equal opportunity specialist, on her own inspection of the various applications. (OFCCP's Brief at

42-45). Mr. Lampkin ultimately concluded that qualifications for entry level jobs did not exist. (TR-530).

III.

OFCCP's complaint charged that the Company engaged in hiring practices which discriminated against the women who applied for entry level blue-collar jobs, later charging it with having affected the class of women who applied for those jobs in 1981. It contends that the Company engaged in a pattern or practice of disparate treatment of women. Its case is simply that the Company treated women less favorably than men by not hiring them on an equal basis with men respecting entry level blue-collar operative positions. Its case parallels a "pattern or practice" action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. =2000 *et seq*. Cases under that Act provide guidance for enforcement proceedings under EO 11246.

A leading case on employment discrimination involved an action brought under Title VII by the United States against an employer and union alleging that the employer engaged in a pattern or practice of discriminating against blacks and Hispanics and that the seniority system perpetuated effects of past racial and ethnic discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The alleged unlawful discriminatory employment practice in the *Teamster's* case is indistinguishable from the issue herein and the principles enunciated by the Supreme Court in that case are largely adhered to in resolving whether the facts substantiate OFCCP's charge.

Appendix F

By substituting the appropriate terms [in brackets] for the terms used in the *Teamster* case, the Court, in effect and for all practical purposes, addresses the issue of sex discrimination in the instant case:

> "Consideration of the question whether the company engaged in a pattern or practice of discriminating hiring practices involves controlling legal principles that are relatively clear. The Government's theory of discrimination was simply that the company, in violation of =703(a) of Title VII, regularly and purposefully treated Negroes and Spanish-surnamed Americans [females] less favorably than white persons [men]. The disparity in treatment allegedly involved the refusal to recruit, hire, transfer, or promote minority group members [females] on an equal basis with white-people [men], particularly with respect to line-driving positions. The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were 'racially premised.' [sexually premised.] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 n. 18, 93 S.Ct 1817, 1825, 36 L.Ed2d 668.
>
> As the plaintiff, the Government bore the initial burden of making out a *prima facie* case of discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280; *McDonnell Douglas Corp. v. Green*,

> *supra*, 411 U.S. at 802, 93 S.Ct., at 1824. And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial [sexual or gender] discrimination was the company's standard operating procedure — the regular rather than the unusual practice."
>
> *Teamsters*, *supra*, at 366, 367.

The Court went on to say that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue.

OFCCP contends that its case is based on statistical and direct evidence which the Company must rebut by showing either that the statistical proof is inaccurate or insignificant or by offering a legitimate non-discriminatory explanation to show that the observed disparity is not the result of intentional discrimination. *Teamsters*, *supra*, at 359; *Segar v. Smith*, 738 F.2d 1249, 1268-9 (D.C. Cir. 1984) *cert. denied*, 105 S.Ct. 2357 (1985).

As direct evidence of the Company's sexual discrimination and bias against employing women as factory workers, the OFCCP notes that being a man is one of the requirements for all of the jobs relating to its complaint.

Appendix F

In addition, OFCCP relies on the testimony of unsuccessful female applicants who described their various experiences applying for work, such as, among other things, having to wait an hour and a half to be interviewed while men who arrived later were interviewed and hired; being encouraged to apply for "secretarial" or office work — "women's work" instead of the factory jobs which they were told was heavy labor, "man's work," "unfit for a woman"; that women were not being hired; and, being told that "you are not going to get the job because you are a woman."

Statistically, OFCCP shows that in 1981 the Company hired 175 out of 849 men, or 20% of the applicants, without hiring any of the 28 female applicants, and as further evidence of disparate treatment, notes that Lawrence Cohen, the Company's late founder and president, interviewed 40% of the hirees, but none of the women job seekers. In addition, OFCCP shows that in the period 1975-1981, the Company hired 1,020 of 5,077 or 20% of the male applicants while hiring but two of 225 females, or less than one percent of the applicants.

Once the OFCCP proves that the Company has followed a policy of unlawful discrimination, the question of individual relief arises. At the remedial stage, the Company cannot then claim that its individual employment decisions were not based on discrimination because it is deemed that it has already been shown that the Company maintained a policy of discriminatory decision-making. At the remedial stage, the OFCCP's burden need not include evidence that each individual in the affected class was discriminatorily denied a job, but need only establish that the affected member

of the class applied unsuccessfully for a job and was a potential victim of the policy of discrimination. The burden then rests on the Company to show that the individual applicant was denied employment for lawful reasons. *Teamsters*, *supra*, at 362. In such situations, the Company is called upon to demonstrate a valid business reason for the cause of the apparent disparate decision. *Segar*, *supra* at 266.

IV.

In rebuttal, the Company contends that there was a valid business reason for the hiring of each of the males and the rejection of each female in 1981, and that its actions were taken for legitimate business reasons only. It argues that it experiences significant problems with turnover and chronic absenteeism which necessitates the shifting of personnel in the plant and requires that hirees be capable of heavy lifting and labor and of doing any job in the plant and that it did not discriminate, but hired the best person for the job in each instance.

John Rowane was the Company's principal witness. Before he retired in 1985, he was the Assistant to the Company's general manager, Gerald Cohen, son of the Company's founder. Among other duties, he was responsible for interviewing applicants, maintaining personnel records and the Company's affirmative action program. Either he or he along with Lawrence Cohen held the interviews in 1981. (TR-753-54). In a letter of September 24, 1982, to Mr. Lampkin, he described his selection criteria for blue-collar hirees as follows:

Appendix F

> The application is the initial basis for selection. There are two main points that are sought. First, *some type of factory or warehouse experience*, so that the individual is aware of shop conditions, as opposed to office or sales work. Secondly, a background which shows continued and steady work history, and/or education or training as opposed to frequent changes of short duration.
>
> Final selection is made during a personal interview, where *an attempt is made to evaluate the individual's attitude, ability to do heavy work, interest in becoming a permanent, steady employee*, etc. (DX-36; PX-3B; TR-309). (emphasis added.)

He testified that his criteria for selecting workers were generally those he kept in his mind when interviewing applicants. Applicants weren't evaluated in accordance with a fixed array of criteria. (TR-1116-18). He used a separate and independent judgment for each applicant. Applicants were not compared to each other when being selected. In determining whether an applicant could do heavy work, he asked whether he or she could do heavy lifting. If the applicant said yes, he marked "HW-OK" on the application. In addition, he noted the applicant's size and stature to determine if they were big and strong enough to handle the work. (TR-1109-1130). Also the applicant's previous work experience, military service and interest in sports, particularly the type, were considered.

Appendix F

Of the job descriptions introduced into evidence, eight required no apprenticeships and six required from zero to three months of previous experience. Mr. Rowane explained that after their probationary period, hirees would be assigned to one of the described occupations, but there was no matching of the individual to those job duties. Those duties, which were learned on the job later, only came into play or were utilized in determining promotions. The duties had no role in the initial hiring decisions. (PX-14 at 44-47).

Typical examples of how his criteria were used in hiring workers are shown by the people selected January 5th, 6th and 7th, 1981. On January 5th, 34 males and one female applied. Ten males were hired based on considerations which included experience with tools, welding, heavy lifting in a warehouse and changing tires, grinding and sheet metal handling, operating a fork lift, cabinet-making and up to four years of military service thought to demonstrate a stick-to-it attitude.

By contrast, the female whose husband had been hired to work the second shift, was 22 years old, stood five feet, one inch tall, and weighed 125 pounds with experience in sedentary factory work, phone solicitation for the American Cancer Society and cashiering at Burger King.

On January 6th, there were 32 applicants of whom two were females. Five men were hired on the basis of their prior experience as a carpenter, boiler mechanic, heavy machinery operator, sawmill work, operating and training others in the operation of a fork lift, and seven years work in one job.

Appendix F

One female was rejected on the assumption that she was interested in general clerical work only. The other because the Company had no assembly work in which she had prior experience and had indicated a preference.

On January 7th, four women and 17 men applied. One male was hired because of his background as a dye-maker and experience with heavy machinery.

One female had experience as a telephone operator, and in clerical and assembly work. Her sister had worked as an assistant bookkeeper, manager of a drug store, cashier and restaurant reservation clerk. The third showed experience in light assembly and inspection work and the fourth indicated an interest in electronics processing and sedentary type inspection work which the Company did not offer.

Mr. Rowane categorically denied that the sex of the applicant entered into any of his decisions.

The Company is highly critical of the Government's case noting that it has changed the basis for it in mid-stream. It points out that the OFCCP's promises of money to the females contacted should be taken into consideration in weighing the credibility of their testimony, and it directly challenges the credibility of two witnesses who testified to specific sex-biased remarks allegedly made by Mr. Rowane. In addition, it faults the OFCCP's refusal to recognize that references to men in its job descriptions were by the terms of its union contract clearly intended to refer to both sexes.

Appendix F

In conclusion, the Company argues that its operation is like a steel mill requiring a great deal of strength and stamina to do the jobs for which applicants were interviewed, and, as were the other criteria used by Mr. Rowane, physical strength and endurance were reasonable criteria in hiring.

Findings and Conclusions

I.

The issue is whether the Company engaged in a pattern or practice of sex discrimination by treating women applicants for entry level blue-collar jobs less favorably than men because of their gender.

According to the Company, the main considerations in the selection of blue-collar employees were factory or warehouse experience, a steady work history, education or training, attitude, ability to do heavy work, and interest in permanent employment. However, until documented in the September 1982 letter to Mr. Lampkin, those criteria remained in Mr. Rowane's private range of senses and perceptions of no fixed design and purportedly unrated in importance, one to the other — in his own words, an "amalgam" of criteria — used, as he testified, to make independent judgments for each individual without comparing the relative qualifications of the applicants and without comparing the female applicants to the males or the males to each other. (TR-1128-29).

However, the evidence of record shows contrary to Mr. Rowane's testimony that he, in fact, did compare male and

female qualifications (TR-863-65), and, further, that the alleged criteria were not uniformly applied to male and female applicants in 1981. For almost each reason given for not hiring a female, the same reason did not bar the hiring of a male. For example, while some men without the desired factory experience were hired, women were rejected because their factory experience was not of the right type. Since, as explained by Mr. Rowane, that factory or warehouse experience was wanted "so that the individual is aware of shop conditions as opposed to office of sales work," the rejection of women because their factory experience wasn't of the right kind is illogical and indefensible.

It becomes apparent from the evidentiary record that, except for skilled mechanics, neither education, job regularity or longevity, or factory or general work history, or attitude — 20 of 25 women indicated in their interviews that they wouldn't mind or were willing to try heavy work — were compelling criteria, because even though comparing less favorably than some women in terms of those particular criteria, some men were hired while none of the women were. There is no probative evidence to show, when their backgrounds are compared to some of the men hired, that all 28 females were unqualified or unsuited by age, health, education, work experience or attitude for the entry jobs advertised. It then becomes apparent that when stripped down to basics for distinguishing among job applicants, the controlling criterion and only qualification that really mattered was physical strength which presaged discrimination against women.

Appendix F

It may be conceded that the Company's factory work, or some of it, was strenuous, although there is some testimony to it being rarely so (TR-1771-74), however, the Company had no programs, mechanisms or guidelines in place for testing or measuring job capability or for determining whether women would be capable of performing the work satisfactorily. Nor, has it been shown that the exclusion of women was necessary to maintain the factory routine of shifting personnel wherever needed in the factory — a routine, after all, required by the significant turnover and chronic absenteeism of an all male crew of factory workers.

Consequently, it is considered reasonable to conclude that hiring decisions rested on Mr. Rowane's intuitive, stereotyped appraisal of women as other than factory workers, a characterization held by the courts to be in violation of the executive order because it denies to women desirable positions with duties which they may be perfectly capable of performing. *See*, *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969), *see also*, *Price Waterhouse v. Hopkins*, 109 S. Ct., 1775 at p. 1791 (1989) (stereotyping is inherently discriminatory). As Justice Brennan said in *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973):

> "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage."

Appendix F

Mr. Rowane's subjective selections systematically operated to freeze out all female applicants for entry level blue-collar jobs. Not a single female was hired in 1981 for a job requiring no experience. Only two of 225 female applicants were hired over a six-year period and the Company's late founder didn't deem it worthy to interview female applicants. These facts hardly attest to the Company's commitment to affirmative action, being gender-neutral or an equal opportunity employer. In the words of Dr. Gary Simon, the Company's own expert witness, a statistician, the discrepancy is statistically significant. It was definitely not due to chance alone. Zero out of 28 isn't just chance. (DX-115; TR-1274).

Accordingly, upon consideration of the record as a whole, it is concluded that the Company engaged in a pattern or practice of sex discrimination by treating women unequally with men and failing to hire them for entry level jobs in 1981.

Relief Under the Executive Order

I.

Relief is provided for under Executive Order 11246 in OFCCP regulations. In pertinent part, they provide:

> "If . . . . a compliance review, results in a determination that the order, equal opportunity clause or regulation issued pursuant thereto, have been violated . . . . OFCCP may institute an administrative enforcement proceeding to enjoin

> violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions."
>
> 41 C.F.R. = 60-1.26(a)(2).
>
> "Relief, including back pay where appropriate, for members of an affected class who by virtue of past discrimination continue to suffer the present effects of discrimination shall be provided . . . . An "affected class" problem must be remedied in order for a contractor to be considered in compliance."
>
> 41 C.F.R. = 60-2.1(b).

Remedies are flexible and should make the victim of the discrimination whole, put them in their rightful places and correct the cause of the discrimination. OFCCP policy statements have interpreted discrimination law remedies consistent with Title VII principles. See OFCCP Order No. 640a5(2-23-87). These principles operate to deter commission of unlawful employment practices and to make persons whole for injuries resulting from unlawful discrimination. *Albemarle*, *supra*, 422 U.S. 405; *Segar*, *supra*, at 1291; *Teamsters*, *supra*, at 361.

OFCCP's position is that all 28 members of the affected class are entitled to back pay and interest based on individual determinations. It calculated lost wages for each of the 28 females as follows: (1) each female applicant was assigned a hypothetical hire date by using the actual date of the first

male hired after the female applied; (2) each female was then linked to all laid-off males who were hired within a four week span, two weeks before and two weeks after, of her hypothetical hire date; (3) an average wage for each female was calculated by taking the actual wage for each male in the particular grouping and dividing by the number of applicable males. (TR-543). The total gross back wages amounted to $340,653.54. This amount would be offset by the interim earnings of each female or calculated interim earnings when specifics were not known. The total offset is $117,558.66 and the net back wages for all females totaled $220,076.88. Prejudgment interest is sought to be added to this amount.

The Company maintains that if the OFCCP has proven its case that an aggregate approach is appropriate. It calculated lost wages using three methods. First, it used three different time windows 7, 14 or 21 days before and after the application dates of each of the females; the actual earnings for all 175 men hired were totalled and divided by 854, the total number of men who applied for employment in 1981. (The actual number of applicants according to the Company's records is 849. PX-11). The total remedy would be approximately $28,000 for all 28 females. (TR-1215). In the second formula, the actual earnings were divided by 175 to arrive at an average salary for each male hired. Since 175 or 20% of the 849 male applicants were hired then six women or 20% of the female applicants would have been hired. Accordingly, six times the average salary previously calculated would amount to $27,411.72 as the total remedy. (TR-1740-41). The final formula would exclude 10 female applicants who weighed less than 125 pounds, presumably

because they could not lift heavy weights. (TR-1242-43). Under all methods the total amount due would be reduced by interim earnings.

II.

With respect to remedies, trial courts have been held to have wide discretion exercising their equitable powers to fashion the most complete relief possible. The framing of a remedial decree is left largely in the hands of the court whose assessment of the needs of the situations is a factual judgment. *Teamsters*, *supra*, at 371, fn. 58; *Segar*, *supra*, at 1290. The court must, as nearly as possible recreate the conditions and relationships that would have existed had there been no unlawful discrimination. The process, however, can involve a degree of approximation and imprecision.

With the above principles in mind, it is determined that neither the OFCCP's nor the Company's formulas for back pay would be particularly appropriate under the circumstances of this case. The relief devised and implemented herein is based on what is believed to be a reasonable assumption that in recreating the conditions that would have developed and existed had there been no discrimination, the working experience of the females, had they been hired by the Company, would most likely have paralleled the experience of the men who were hired in 1981.

Dr. Simon testified from data supplied to him by the Company that 88% of the males hired in 1981 were left after the first week of employment, 35% after six months, 18% after a year and 4% after 18 months, and that the median

time on the job was 12.5 weeks which meant that half of those who took jobs at the Company were gone in three and a half months. (TR-1164-66).

Consequently there is little, if any, reason to believe that any of the female applicants would have proven to be more durable or fared any better, and the median time worked is deemed to be a reasonable basis for calculating back pay. The starting salary for factory help was $4.00 per hour, amounting to wages of $160.00 for a 40-hour week or $2,000.00 for 12.5 weeks of work. Accordingly, the Company shall be liable for the payment of $2,000.00 to each member of the affected class.

III.

It is not believed that prejudgment interest is required or necessary in this case.

Like the award of back pay, courts have held that an award of prejudgment interest is discretionary, and this case is not without mitigating circumstances or equities that should be balanced.

First, the Company's hiring practices were not evidenced by the pernicious characteristics that pervade racial and ethnic discrimination. Notwithstanding the holding on liability, the evidence that gender was the sole relevant factor in all of Mr. Rowane's hiring decisions or that the rejection of a number of the females in 1981 was without some legitimate considerations is not inarguable. Examinations of the 28 applications does not conjure up the image of a

potential corps of star-spangled factory laborers. (PX-10, DX-4).

However, any selection procedure that produces a substantially different rate of selection in hiring and works to the disadvantage of members of a race, sex or ethnic group is considered discriminatory unless the procedure has been validated. Uniform selection procedure principles and guidelines designed to assist employers and others in complying with Federal law prohibiting discriminatory employment practices have been jointly adopted by the Equal Employment Opportunity Commission, the Office of Personnel Management, the Departments of Labor and Justice and are set forth in Part 60-3 of Title 41 of the Code of Federal Regulations. Methods for validating selection of employees are described in Part 60-3.5.

Unfortunately, as mentioned above, the Company had no selection validation procedure in place remotely consistent with the guidelines to determine objectively whether any of the female applicants had the physical capacity to do its work. It has been held that subjective criteria could "serve as a veil of screening legitimacy behind which illegal discrimination is operating." *Segar, supra*, at 1276. Thus under the facts of this case the law operates to cause Mr. Rowane's subjective criteria to be impermissible and sustains the right of all 28 female applicants to be remunerated as members of the affected class.

Secondly, this is not a case in which there is a fixed amount of lost wages which can be unequivocally determined, and there is too much conjecture and surmise

built into the reconstruction of back wages for a significant number of the class about whom there is little or no information to warrant the imposition of interest on top of the back pay award. Further, it is believed that the back pay determined to be due each of the members of the affected class fairly and reasonably covers the highly speculative losses and provides equitable make-whole relief for all of them as a group.

Thirdly, there is no reason to believe that the Company acted in bad faith in its uneven treatment of the women applicants. It is believed that its unlawful conduct was solely due to its failure to structure a program or system to validate its hiring decisions. It firmly believed that it was hiring the best person for the available job, and in contesting OFCCP's charges should not be penalized for the delays and time consumed in this unduly lengthy administrative proceeding while pursuing its day in court.

IV.

OFCCP requests debarment of the Company pursuant to § 209(a)(15) and (6) of the EO and OFCCP regulations 41 C.F.R. 60-30.30. It argues that debarment "in this case is a necessary means of enforcement rather than a punitive sanction." The District Court has held that the EO "would be nothing more than an empty shell, an abstract statement of principles, unless it is backed by adequate means of enforcement." *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 375 (D.D.C. 1979). The Secretary of Labor has consistently utilized the debarment sanction to ensure that compliance is achieved. *See, OFCCP v. Uniroyal, Inc.* Case No. OFCCP

1977-1 (June 28, 1979); *OFCCP v. Prudential Insurance Co.*, 80-OFCCP n-19 (Decision and Final Order of the Secretary of Labor, July 27, 1980).

However, debarment is not recommended for several reasons. First, the Company is only one of three that provide strategic material for the nation's defense program. Secondly, the violations occurred 10 years ago, females are currently employed in the factory and there is no evidence of other unlawful discrimination. Thirdly, the discrimination has not been found to have resulted from a stratagem specifically designed to discriminate against women per se and debarment would be considered punitive.

RECOMMENDED ORDER

Lawrence Aviation is, hereby, ordered:

(1) To cease and desist from further violation of Section 202 of Executive Order 11246 prohibiting sex discrimination, and the regulations promulgated thereunder, by hiring female applicants into entry level blue-collar positions.

(2) To make the victims of discrimination whole by paying $2,000.00 to each of the 28 members of the affected class.

(3) To establish an interest bearing escrow account, and deposit all monies due to any of the discriminates who cannot be located. These monies will remain in this account for six months during which time the Company and OFCCP will

conduct efforts to locate them. If, after this time period, the discriminates still are not found, the monies allocated to these women will be returned to the Company.

s/ Aaron Silverman
AARON SILVERMAN
Administrative Law Judge

Dated: MAY 30 1991

Washington, D.C.

Supreme Court, U.S.
FILED
JAN 3 2000
CLERK

(2)

No. 99-570

In the Supreme Court of the United States

LAWRENCE AVIATION INDUSTRIES, INC., PETITIONER

v.

ALEXIS HERMAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Executive Order No. 11,246, its implementing regulations, or any other applicable law provides a limitations period for the Secretary of Labor's initiation of administrative enforcement proceedings against a government contractor.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

FEC v. *Akins*, 524 U.S. 11 (1998)	11
NCAA v. *Smith*, 525 U.S. 459 (1999)	8
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977)	9, 10, 12
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)	11
Volvo GM Heavy Truck Corp. v. *United States Dep't of Labor*, 118 F.3d 205 (4th Cir. 1997)	10, 11

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
5 U.S.C. 701-706	3
5 U.S.C. 706(1)	12
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	2, 9, 10, 12
42 U.S.C. 2000e note	2
42 U.S.C. 2000e-5(b)	9, 10
42 U.S.C. 2000e-5(e)(1)	9
42 U.S.C. 2000e-5(f)(1)	9
41 C.F.R. Pt. 60 (1981):	
Section 60-1.2	2
Section 60-1.20	3, 9
Section 60-1.20(b)	3, 9
Section 60-1.20(d)	3
Sections 60-1.20 to 60-1.24	9
Section 60-1.21	3, 5, 6, 7, 8
Sections 60-1.21 to 60-1.24	3
Section 60-1.22	7

Regulations and rule—Continued: Page

Section 60-1.23 7
Section 60-1.24 ..... 7, 9
Section 60-1.24(c)(2) 3, 9
Section 60-1.26 ..... 4, 6
Section 60-1.26(a) 3, 9
Section 60-1.26(a)(2) 3, 8, 9
Section 60-1.33 9
Section 60-30 8
Sections 60-30.1 to 60-30.27 2
Section 60-30.5 4
Section 60-30.5(a) 4, 8
Sections 60-30.28 to 60-30.30 3
Section 60-30.30 ..... 2, 7
Exec. Order No. 11,246, 3 C.F.R. 167 (Supp. 1965)
(42 U.S.C. 2000e) 2, 7, 8, 9, 10, 12
Sup. Ct. R. 35.3 1

In the Supreme Court of the United States

No. 99-570

LAWRENCE AVIATION INDUSTRIES, INC., PETITIONER

v.

ALEXIS HERMAN,[1] SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the decision is noted at 182 F.3d 900 (Table). The district court's opinion (Pet. App. 6a-37a) is reported at 28 F. Supp. 2d 728. The administrative decisions are unreported. They include the November

[1] The caption of the Petition identifies the respondents as Lawrence Summers, Secretary of Labor, Office of Federal Contract Compliance Programs, and United States Department of Labor. The Secretary of Labor is Alexis M. Herman, Lawrence Summers is the Secretary of the Treasury. This brief's caption corrects the error. See Sup. Ct. R. 35.3 ("any misnomer not affecting substantial rights of the parties" concerning a public office who is a party in an official capacity "will be disregarded").

9, 1995 Final Decision and Order of the Secretary of Labor (Pet. App. 40a-41a); the July 27, 1995 Recommended Decision and Order of the Administrative Law Judge on Remand (J.A. A1344-A1354); the June 15, 1994 Decision and Remand Order of the Secretary of Labor (Pet. App. 42a-55a); and the May 30, 1991 Recommended Decision and Order of the Administrative Law Judge (Pet. App. 56a-82a).

JURISDICTION

The court of appeals entered its judgment on July 7, 1999. The petition for a writ of certiorari was filed on October 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Executive Order No. 11,246, as amended, prohibits federal contractors from engaging in employment discrimination based on race, color, religion, sex, or national origin, and requires contractors to take affirmative steps to ensure nondiscriminatory treatment of their employees and job applicants. Exec. Order No. 11246, § 202(1) (reprinted, as amended, as a note following 42 U.S.C. 2000e). The Secretary of Labor is responsible for the administration and enforcement of the Executive Order, including the issuance of implementing rules, regulations, and orders. *Id.* § 201. Under the applicable regulations, the Office of Federal Contract Compliance Programs (OFCCP) administers and enforces the Executive Order, 41 C.F.R. 60-1.2 (1981); the Office of Administrative Law Judges conducts hearings and issues recommended decisions, 41 C.F.R. 60-30.1 to 60-30.27; and the Secretary of Labor issues final ad-

ministrative orders. 41 C.F.R. 60-30.28 to 60-30.30.[2] Final agency action is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701-706.

OFCCP obtains information regarding possible violations of the Executive Order by conducting periodic compliance reviews, 41 C.F.R. 60-1.20, and by investigating complaints filed with the agency. 41 C.F.R. 60-1.21 to 60-1.24; see also 41 C.F.R. 60- 1.26(a). "Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the Director for good cause shown." 41 C.F.R. 60-1.21. The regulations prescribe no timetable for compliance reviews, except that any federal contract or subcontract for $1 million or more is subject to a preaward review. 41 C.F.R. 60-1.20(d). If a compliance review reveals a deficiency in the contractor's compliance with the Executive Order, "reasonable efforts shall be made to secure compliance through conciliation and persuasion." 41 C.F.R. 60-1.20(b). Complaints likewise are to be "resolved by informal means whenever possible." 41 C.F.R. 60-1.24(c)(2).

If informal resolution fails, "OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions," including debarment from future federal contracts. 41 C.F.R. 60-1.26(a)(2). Such a pro-

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[2] Citations are to the 1981 edition of the Code of Federal Regulations. The regulations cited herein, codified at 41 C.F.R. Part 60, remained in effect from 1981, when the underlying discrimination occurred, through 1995, when the Secretary's final decision was issued.

ceeding is initiated when OFCCP, represented by the Solicitor of Labor, files an administrative complaint with the Department's Office of Administrative Law Judges, naming the contractor as the defendant. 41 C.F.R. 60-30.5(a). Neither the rule describing enforcement proceedings generally, 41 C.F.R. 60- 1.26, nor the rule governing the filing of administrative complaints, 41 C.F.R. 60-30.5, contains any time limit.

2. Petitioner Lawrence Aviation Industries is a government subcontractor subject to Executive Order No. 11,246. Pet. 11; Pet. App. 7a-8a. In 1979, a fire destroyed a large part of petitioner's plant, causing it to lay off half of its employees. Pet. App. 12a. In 1981, after rebuilding its plant, petitioner began hiring entry level blue-collar workers to perform machine operation and other factory work. *Id.* at 12a-13a. Petitioner hired 175 of the 849 male applicants for those jobs, but hired none of the 28 women who applied. *Id.* at 13a. Several female applicants testified that petitioner's interviewer told them the jobs were not suitable for women, and petitioner's job descriptions listed among the qualifications that the applicant be a man. *Id.* at 14a-18a. The record also showed that many of petitioner's hiring criteria were unwritten, subjective, and not applied equally to men and women. *Id.* at 19a-23a.

In 1982, OFCCP conducted a compliance review of petitioner. As a result of that review, OFCCP notified petitioner in January 1983 of twelve points of deficiency in its compliance with the Executive Order. Pet. App. 25a-26a, 57a-58a. After meeting six times, the parties resolved eleven of the deficiencies. They were unable, however, to resolve OFCCP's allegation that petitioner intentionally failed to hire women into entry level positions in 1981 because of their gender. Consequently, OFCCP initiated administrative enforcement

proceedings against petitioner on March 31, 1987. *Id.* at 6a.

After pretrial discovery and a twelve-day hearing, Pet. App. 9a, an administrative law judge (ALJ) issued a Recommended Decision and Order on May 30, 1991. *Id.* at 56a-82a. The ALJ concluded that petitioner engaged in a pattern or practice of sex discrimination by failing to hire women for entry level jobs in 1981, *id.* at 74a, and recommended awarding each of the 28 female applicants $2000 in back pay without prejudgment interest. *Id.* at 78a. With respect to timeliness, the ALJ held that "[t]he issue of limitations raised for the first time in the Company's Brief, does not apply to agency complaints following compliance reviews." *Id.* at 57a n.2.

Both parties filed exceptions with the Secretary, Pet. App. 43a, who issued a Decision and Remand Order on June 15, 1994. *Id.* at 42a-55a. The Secretary adopted the ALJ's finding of sex discrimination in hiring, *id.* at 44a, but rejected the recommended relief. The Secretary instead remanded to the ALJ to recalculate back pay, and ordered debarment if petitioner failed to comply with a final back pay order. *Id.* at 49a-55a. In a Recommended Decision and Order on Remand dated July 27, 1995, an ALJ awarded a total of $180,000 in back pay and interest to the 28 female applicants. J.A. A1344-A1351. On November 9, 1995, the Secretary issued a Final Decision and Order summarily adopting the ALJ's back pay calculation. Pet. App. 40a-41a. None of these last three administrative decisions addressed the limitations issue.

On December 28, 1995, petitioner filed a petition in the district court, seeking review of the Secretary's Final Decision and Order pursuant to the APA. Pet. App. 7a. Ruling on cross-motions for summary judg-

ment, the district court affirmed the Secretary's final decision in all respects. *Id.* at 6a-39a. As pertinent here, the district court rejected as "without merit" petitioner's argument that the administrative proceeding was time-barred under 41 C.F.R. 60-1.21 because OFCCP's administrative complaint was filed more than 180 days after petitioner's 1981 hiring decisions. Pet. App. 26a-27a. As the court explained, Section 60-1.21 "refers solely to individual complaints filed with the OFCCP," and has no application to enforcement proceedings commenced by OFCCP. *Id.* at 27a. The court noted that a separate regulation, 41 C.F.R. 60-1.26, sets the procedure for initiating such enforcement actions. That regulation, the court observed, "provides no statute of limitations." Pet. App. 27a.

In an unpublished summary order, the court of appeals affirmed in part, vacated in part, and remanded for further consideration of certain aspects of the back pay award. Pet. App. 1a-5a. "For substantially the reasons stated by the district court in its detailed opinion," the court of appeals affirmed the portion of the district court's judgment rejecting petitioner's claim "that the administrative action was untimely when filed." *Id.* at 2a-3a.

ARGUMENT

The unpublished decision of the court of appeals correctly decided the timeliness question and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's determination that the 180-day time limit in 41 C.F.R. 60-1.21 does not apply to the filing of an administrative complaint by OFCCP to initiate formal

enforcement proceedings against a contractor.[3] Section 60-1.21, entitled "Filing complaints," provides that "[c]omplaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the Director [of OFCCP] for good cause shown." It is followed immediately by regulations specifying where a private party may file a complaint, 41 C.F.R. 60-1.22, the required contents of such a complaint (including the "name, address, and telephone number of the complainant" and signature of "the complainant or his/her authorized representative"), 41 C.F.R. 60-1.23, and the steps to be taken by OFCCP in responding to a complaint. 41 C.F.R. 60-1.24. These regulations plainly apply to informal complaints filed with OFCCP by persons aggrieved by a contractor's non-compliance with Executive Order No. 11,246, not to formal complaints filed by OFCCP with the Office of Administrative Law Judges to initiate an administrative adjudication.

Separate regulations—without time limits—address OFCCP's initiation of formal enforcement proceedings:

> If the investigation of a complaint, or a compliance review, results in a determination that the Order, equal opportunity clause or regulations issued pursuant thereto, have been violated, and the violations

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[3] Petitioner argued to the ALJ and the courts below that 41 C.F.R. 60-1.21 applies directly to OFCCP's filing of an administrative complaint, although it failed to make that argument in its exceptions to the Secretary. Petitioner shifted its argument slightly in the court of appeals, and shifted it again in its petition to this Court. Petitioner now contends that Section 60-1.21's 180-day limitations period for employee complaints to OFCCP should be "borrowed" and applied to administrative enforcement proceedings such as the instant case. See pp. 8-9, *infra*.

> have not been corrected in accordance with the conciliation procedures in this chapter, OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions, or any of the above.

41 C.F.R. 60-1.26(a)(2). In addition, the rules of practice for administrative proceedings under Executive Order No. 11,246, published at 41 C.F.R. 60-30, authorize the Solicitor of Labor, on behalf of OFCCP, "to institute enforcement proceedings by filing a complaint and serving the complaint upon the contractor which shall be designated as the defendant." 41 C.F.R. 60-30.5(a). Those rules impose no time limit on the initiation of administrative enforcement proceedings under the Executive Order. The court of appeals was therefore correct in upholding the timeliness of OFCCP's enforcement action here.

2. Petitioner now contends (Pet. 8-9, 15-17) that the decision below conflicts with decisions of this Court borrowing limitations periods from analogous state or federal laws when a federal statute contains no limitations period of its own. Petitioner, however, did not rely on this argument below. Before the ALJ and district court, petitioner argued solely for the direct application of 41 C.F.R. 60-1.21. Before the court of appeals, petitioner suggested only as an afterthought that Section 60-1.21 should apply here by analogy. See Pet. C.A. Br. 2, 24-25. Neither the district court nor the court of appeals addressed any type of borrowing argument. See Pet. App. 2a-3a, 26a-27a. This Court generally declines to consider arguments not addressed below. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

In any event, the decision below is entirely consistent with this Court's jurisprudence. Particularly analogous is the Court's decision in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), that no statute of limitations applies to suits brought by the EEOC to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The regulatory enforcement scheme for Executive Order No. 11,246 is largely parallel to the statutory enforcement scheme for Title VII. Both schemes authorize the relevant agency to investigate, either in response to an outside complaint or on its own initiative, whether an employer has engaged in unlawful discrimination. Compare 41 C.F.R. 60-1.20 to 60-1.24, with 42 U.S.C. 2000e-5(b). Both require the agency to notify the employer of any finding of discrimination and to attempt to resolve the violation through conciliation. Compare 41 C.F.R. 60-1.20(b), 60-1.24(c)(2), and 60-1.33, with 42 U.S.C. 2000e-5(b). Only upon the failure of such conciliation efforts may the agency commence enforcement proceedings, OFCCP by filing an administrative complaint, 41 C.F.R. 60-1.26(a)(2), and the EEOC by commencing an action in district court. 42 U.S.C. 2000e-5(f)(1). And while both Executive Order No. 11,246 and Title VII specify a 180-day period for the filing of private complaints with the relevant agency (see 41 C.F.R. 60-1.21; 42 U.S.C. 2000e-5(e)(1)), neither prescribes a limitations period for the initiation of agency enforcement actions against employers. See pp. 3-4, *supra*; *Occidental Life*, 432 U.S. at 359-366.

In *Occidental Life*, the Court rejected essentially the same arguments petitioner makes here. First, the Court declined to interpret a 180-day period elsewhere in Title VII, 42 U.S.C. 2000e-5(f)(1) (permitting a private right of action if the EEOC has not acted on a

charge within 180 days), as a limitation on the agency's power to bring its own enforcement action. 432 U.S. at 360-366. Second, the Court declined to superimpose a borrowed state statute of limitations on Title VII's "integrated, multistep enforcement procedure." 432 U.S. at 359. As the Court explained, "[s]tate limitations periods will not be borrowed if their application would be inconsisent with the underlying policies of the federal statute." *Id.* at 367. Here, as in the Title VII context, the adoption of a limitations period could interfere with the duty of the federal agency to "investigat[e] claims of employment discrimination and settl[e] disputes, if possible, in an informal, noncoercive fashion." *Id.* at 367-368.[4]

3. Citing *Volvo GM Heavy Truck Corp.* v. *United States Department of Labor*, 118 F.3d 205 (4th Cir. 1997), petitioner contends (Pet. 7-8, 17-18) that the Court should grant certiorari to resolve the "uncertainty" over what limitations period, if any, applies to enforcement actions under Executive Order No. 11,246. In *Volvo*, OFCCP initiated an administrative enforcement proceeding against Volvo, alleging that Volvo had

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[4] Petitioner (Pet. 16) attempts to distinguish *Occidental Life* on the ground that "unlike Title VII, which imposes strict time limits for the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator * * * EO 11246 as construed below has no such time limits." In fact, both Title VII and the Executive Order regulations provide a 180-day time limit for the filing of private complaints with the agency. And while Executive Order No. 11,246 lacks the provision in Title VII requiring notice to the employer within ten days after a charge is filed (42 U.S.C. 2000e-5(b)), petitioner does not argue that OFCCP fails to provide timely notice to contractors. Petitioner also does not contend that it lacked timely notice of OFCCP's view of its 1981 hiring practices.

violated the Executive Order several years earlier by discriminating against female job applicants. 118 F.3d at 206-207. Volvo sued the Department of Labor in federal district court, alleging, *inter alia*, that OFCCP's enforcement action was barred by a state statute of limitations. *Id.* at 207. The district court dismissed the contractor's suit for failure to exhaust administrative remedies, and the court of appeals affirmed without reaching the merits of the statute of limitations issue. *Id.* at 208-215. Thus, the court of appeals' unpublished decision in this case is in no tension with the Fourth Circuit's holding in *Volvo*.

OFCCP "acknowledged * * * uncertainty" (Pet. 7) in *Volvo* only insofar as it maintained that exhaustion of administrative remedies would not be futile because the Secretary of Labor had not finally decided what limitations period, if any, applies to administrative enforcement proceedings under the Executive Order. 118 F.3d at 213. Whether the Secretary herself will apply a limitations period to her own enforcement actions is distinct from whether a court should impose limitations in the absence of any regulatory or statutory language supporting such an imposition. Uncertainty in the former does not justify judicial action in the latter.[5]

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[5] Moreover, even assuming that some uncertainty remains, the lack of a final decision by the Secretary of Labor on the limitations issue is a reason for this Court to deny review, so that the agency may be given the first opportunity to address those issues based on its specialized expertise. See, *e.g.*, *FEC* v. *Akins*, 524 U.S. 11, 29 (1998); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 93-95 (1943). Certainly, review should not be granted in a case where petitioner did not present any limitations argument, much less the one contained in its petition, to the Secretary in its exceptions to the ALJ's recommended decision. See p. 7 n.3, *supra*.

4. Finally, petitioner argues that if no limitations period applies, the Secretary will have unfettered discretion to bring long-delayed enforcement proceedings, and "investigations that began five, ten or fifty years after the last act of discrimination would be timely." Pet. 17. That concern is exaggerated, and is not presented on the facts of this case. As this Court observed in *Occidental Life*, the "absence of inflexible time limitations on the bringing of lawsuits will not * * * deprive defendants * * * of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims." 432 U.S. at 372. Under Title VII, defendants receive notice and an opportunity for informal resolution before litigation begins, and federal courts may restrict or even deny back pay relief if a defendant is actually prejudiced by agency delay. *Id.* at 373. Similarly under Executive Order No. 11,246, agency action is constrained by judicial review under the APA. See 5 U.S.C. 706(1).

Moreover, petitioner neither asserted nor proved below that OFCCP's alleged delay in filing a formal administrative complaint prejudiced petitioner's defense. Indeed, there was no such prejudice in this case. The disputed hiring occurred in 1981. OFCCP conducted a compliance review in 1982, and notified petitioner of its findings in January 1983. OFCCP and petitioner then engaged in extensive conciliation efforts. After those efforts proved unsuccessful on one out of twelve issues, OFCCP filed a formal complaint in March 1987. Petitioner does not claim that it was unfamiliar with any of the allegations contained in OFCCP's complaint at the time the complaint was filed. Thus, OFCCP's claim was not "stale," and the filing of its complaint did not subject petitioner to "surprise and prejudice." *Occidental Life*, 432 U.S. at 372.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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